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In The

Supreme Court of the United States

October Term, 1983

NICHOLAS MANCUSO, DOROTHY A. KENNEDY, MAY SMITH, SHELLY GOLDFEDER, DOROTHY S. KENNEDY, BRUCE I. GIAMMATTEI, VIRGINIA HAYES, RICHARD L. IADAROLA, IGNACIA F. MANIERI, NICK DeGAETA, JOHN J. McCLUSKEY, LOUIS C. CALL and KENNETH ELLIS, individually and on behalf of the class and subclasses of similarly situated persons,

Petitioners,

vs.

THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as President of City Council, NEW YORK CITY FIRE DEPARTMENT, CHARLES J. HYNES, individually and as Fire Commissioner of the City of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether in the context of a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6), the District Court departed from and the Court of Appeals for the Second Circuit accepted a departure from the usual course of judicial proceedings in:

A. Permitting respondents to convert a Rule 12(b)(6) motion into a Rule 56 motion without allowing proper recourse to petitioners under Rule 56, and

B. Permitting the Complaint herein to be dismissed on the ground that petitioners failed to allege facts sufficient to demonstrate the absence of a "rational basis" under the Equal Protection Clause for respondents' disparate provision of fire protection services claimed therein?

2. Whether in the context of a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6), the District Court departed from and the Court of Appeals for the Second Circuit accepted a departure from the usual course of judicial proceedings in:

A. Permitting respondents to convert a Rule 12(b)(6) motion into a Rule 56 motion without allowing proper recourse to petitioners under Rule 56, and

B. Permitting the Complaint herein to be dismissed on the ground that petitioners failed to allege facts sufficient to demonstrate the deprivation by respondents of constitutionally cognizable rights without the constitutional safeguards required under the Due Process Clause?

LIST OF ALL PARTIES

All parties appear in the caption of the case in this Court.

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THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as President of the City Council, NEW YORK CITY FIRE DEPARTMENT, CHARLES J. HYNES, individually and as Fire Commissioner of the City of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Opinion of the Court of Appeals for the Second Circuit,[1] not officially reported, appears in the Appendix hereto (1a).[2] Such Opinion affirms the Opinion and Order of the United States District Court, Southern District of New York (Griesa, J.), not officially reported and appearing in the Appendix hereto (5a), which dismissed the Complaint herein pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure[3] on the grounds that such Complaint failed to allege facts showing the absence of a "rational basis" under the Equal Protection Clause or a "substantive right" under the Due Process Clause of the Federal Constitution for the disparate provision of fire protection claimed therein.

JURISDICTION

This Petition for a Writ of Certiorari has been filed within ninety (90) days of the entry of the Judgment of the Court of Appeals for the Second Circuit on June 14, 1983, as required by 28 U.S.C. §2101(c). This Court's jurisdiction to review the Judgment below is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

New York General City Law §20(12) provides:

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1. Oakes and Meskill, Circuit Judges; Hill, District Judge for the Central District of California.

2. Hereinafter, all references to the Appendix will be denoted "00a."

3. Hereinafter, all references to the Federal Rules of Civil Procedure will be denoted "Rule 000."

> §20. Grant of specific powers. Subject to the constitution and general laws of this state, every city is empowered:
>
> 12. To prevent and extinguish fires and to protect the inhabitants of the city and property within the city from loss or damage by fire or other casualty.

New York City Charter §487 provides, in pertinent part:

> §487. Powers.-a. The commissioner shall have sole and exclusive power and perform all duties for the government, discipline, management, maintenance and direction of the fire department and the premises and property in the custody thereof.
>
> b. The department shall have sole and exclusive power and authority to extinguish fires at any place within the jurisdiction of the city and shall have power and authority to extinguish fires upon any vessel in the port of New York or upon any dock, wharf, pier, warehouse or other structure bordering upon or adjacent to such port.

Administrative Code of the City of New York §1173-4.3(b) provides:

> b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons;

maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining. (Added by L.L. 1972, No. 1, Jan. 12, 1972.)

STATEMENT OF THE CASE

A. The Proceedings

This as yet uncertified class action was commenced on March 22, 1982 in the United States District Court, Southern District of New York, seeking judgment pursuant to 28 U.S.C. §2201 and Rule 57, declaring that the failure of respondents to provide adequate fire protection within the 71 Fire Districts assigned undermanned Engine Companies constituted violations of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. Jurisdiction of that court was premised on 28 U.S.C. §1343(3), 28 U.S.C. §1331 and 42 U.S.C. §1983.

On April 16, 1982, prior to service of an Answer or a Motion directed at the pleadings, but before any proceedings by

respondents, petitioners served a Request for Documents upon respondents pursuant to Rule 34. On April 19, 1982, at a court-directed conference, the District Court relieved respondents of any obligation to produce the requested documents and directed that respondents move to dismiss the Complaint prior to answering.

On May 12, 1982, respondents moved for an Order dismissing the Complaint herein pursuant to Rule 12(b)(6). Annexed to such Motion, however, was the supporting Affidavit of respondents' counsel. On December 16, 1982, without permitting petitioners any opportunity to submit Affidavits or conduct discovery, the District Court permitted respondents to convert the Rule 12(b)(6) motion into a Rule 56 motion and granted respondents' Motion to Dismiss the Complaint.

On June 14, 1983, the Court of Appeals for the Second Circuit affirmed the District Court's decision.

B. The Facts

This action was brought by petitioners who represent a class of citizens living and working in 71 different areas of the City of New York (hereinafter "the City"), denominated Fire Districts, which are assigned four firefighter per tour Engine Companies as opposed to the five firefighter per tour Engine Companies which are assigned to the other 139 Fire Districts throughout the City.

Pursuant to New York General City Law §20(12),[4] New York State has delegated to the City the power to prevent and extinguish fires and to protect its citizens and their property from damage

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4. Hereinafter, all references to sections of New York General City Law will be denoted "N.Y.G.C.L.§00."

by fire. (¶15).[5] The City assumed the exclusive power and authority to carry out this function with the passage of New York City Charter §487.[6] (¶16). Unlike any other service provided by the City, every resident of and visitor to the City is exclusively dependent upon the Fire Department to protect their persons and property from fire. (¶19). The Fire Department's function is fundamental and essential to the security and order of City life.

Prior to 1971, many Engine Companies were manned with four firefighters per tour and an officer. (¶20). In 1971, the Fire Department determined that all Engine Companies throughout the City had to have at least five firefighters per tour and an officer to provide the minimum level of required fire protection. (¶21). Accordingly, the City elevated the manning level, and in many Engine Companies, particularly those located in heavy workload Fire Districts, more than five firefighters were assigned. (¶21).

Due solely to the temporary budgetary deficits experienced by the City during the mid-1970's, the City ordered on June 30, 1975, that the manning levels in all but 42 Engine Companies be reduced to four firefighters. (¶22). In addition, during this same period, 51 firefighting units were disbanded by the City. Upon information and belief, tests and studies undertaken by the Fire Department have revealed that staffing Engine Companies with four firefighters is insufficient to permit such Companies to perform efficiently their firefighting tasks. (¶23).

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5. References are to paragraphs of the Complaint, which has been included in the Appendix hereto in order to afford the Court the opportunity to examine all the allegations thereof, inasmuch as this case involves a motion addressed solely to the sufficiency of the Complaint.

6. Hereinafter, all references to sections of the New York City Charter will be denoted "N.Y.C. Charter §00."

Between July 1, 1977 and May 1, 1979, as the budgetary crisis abated, the City, upon information and belief, recognized the need to assign five firefighters to Engine Companies, and systematically elevated staffing levels in all but 71 of the Engine Companies. (¶24). Despite this remanning, the 71 Engine Companies listed in ¶25 of the Complaint remain undermanned to date, and thus are incapable of providing the minimum level of required fire protection to persons working and residing in the Fire Districts to which these Engine Companies are assigned. Since May 1, 1979, the City has denied repeated requests to increase the manning level in the remaining 71 Engine Companies to five firefighters. (¶26).

City officials, including the Mayor and the City Comptroller, recently have announced to the public a substantial budgetary surplus, revealing that the initial purportedly adequate legal reason and justification for undermanning in the remaining 71 Engine Companies no longer exists. (¶27). Notwithstanding the aforementioned budgetary surplus, the City has continued to deny the requests of members of the class to bring the undermanned 71 Engine Companies up to the minimum staffing level of five firefighters. (¶28).

Furthermore, upon information and belief, there has been a dramatic increase in the number of responses to alarms throughout the City between 1968 and 1980. (¶31). The 71 undermanned Engine Companies have experienced a similar dramatic increase in responses during this period (¶32), but the increased workload has impacted disproportionately upon firefighters assigned to the 71 undermanned Engine Companies. (¶33). This disproportionate impact has resulted in a decrease in the firefighting efficiency of the undermanned Engine Companies through, *inter alia,* fatigue and fatigue-related line-of-duty injuries. (¶34).

Finally, upon information and belief, based upon the aforementioned tests and studies, the Commissioner in August, 1981, recommended to the Mayor and the City that the manning level be increased in some or all of the 71 undermanned Engine Companies to five firefighters. (¶45). Requests by members of the class for copies of any such recommendations made by the Commissioner have been denied by the City and Fire Department.[7]

REASONS FOR GRANTING THE WRIT

I.

MUNICIPALITIES MUST DEMONSTRATE A RATIONAL BASIS FOR THEIR ACTIONS EVEN WHERE NO SUSPECT CLASS OR FUNDAMENTAL RIGHT IS INVOLVED.

A. The Complaint states a cause of action under the Equal Protection Clause of the Fourteenth Amendment and should not have been dismissed especially where, as here, the courts below precluded petitioners from conducting any discovery.

The second claim for relief in the Complaint states a cause of action under the Equal Protection Clause of the Fourteenth Amendment. *See* Complaint ¶57. Specifically framed, the ultimate issue in this case is whether there is a rational basis for the current disparate allocation of fire protection provided to petitioners. The decision of the Second Circuit in this case (dated and filed June 14, 1983) conflicts with the very existence of the rational basis test. *See Dandridge v. Williams*, 397 U.S. 471 (1970).

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7. Item (j) in Petitioners' Request for Documents also sought production of this vital information. The District Court, however, relieved respondents of the obligation of producing this information.

The Complaint adequately alleges the absence of a rational basis for the disparate provision of fire protection. *See e.g.* Complaint ¶¶36-41, 47-50, 56-58. It cannot be said that the allegations of the Complaint are defective or insufficient. The circumstances set out therein clearly are incompatible with a rational scheme for allocation of fire protection services. Thus, the district and circuit courts should have upheld the Complaint at this early stage of the proceedings because there was a possibility of petitioners establishing the absence of a rational basis for the continued unequal allocation of fire protection.[8]

Realistic application of the rational basis test requires one to recognize the effect of changed circumstances and the passage of time on the continued propriety of a once legitimate rational basis. An initial rational basis, employed to justify disparate governmental protection, may in fact abate over time so that the constitutional guarantee of equal protection must be reinstated. Such is the situation in the instant case. *See e. g.* Complaint ¶¶22, 24-28.

The Complaint alleges, and respondents do not contest that: (i) the proper level of manning of New York City Engine Companies is five firefighters, as determined in 1971 by the Fire Department and as accepted by the City (Complaint ¶21); and (ii) the advent of the New York City fiscal crisis in the mid-1970's

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8. In this connection, respondents' attorney's affidavit supporting the Rule 12(b)(6) motion was improper to the extent that it went beyond the Complaint and placed before the District Court what must necessarily be speculative and hypothetical rationales in an extraneous attempt to justify the disparate provision of fire protection services. It was inequitable for the District Court to convert the Rule 12(b)(6) motion to dismiss to a summary judgment motion under Rule 56 yet bar all discovery by petitioners, thus precluding an adequate opportunity to assess and contest the purported rational basis justifying the disparate provision of fire protection services. This issue is more fully discussed below.

and the resultant budgetary deficit (the original rational basis) caused the Fire Department and the City to decrease the manning level to four firefighters (Complaint ¶22). Respondents, in their brief below, concede that between July, 1977 and May, 1979 the "fiscal situation improved" and that "staffing was increased." During this period the City systematically reinstated five firefighters to all but 71 of the Engine Companies. Complaint ¶24. Moreover, as previously mentioned, Mayor Koch released a statement on April 20, 1983, regarding his decision not to propose any reductions in Fire Department manning in connection with the pending executive budget. The rationale for this decision as set forth in said statement includes the Mayor's assertions that "the basic legal assumption upon which we included four-man manning in the budget has been eliminated" and "a number of elected officials . . . have expressed concern that the city has not yet met its burden of proof that a reduction in manning would not create any safety issue." (50a). The undenied subsequent abatement of the final crisis and ensuing budget surplus mandate a return to proper manning levels for the 71 currently understaffed Companies.

Further examples of the current lack of rationality underlying the City's continued misallocation of fire protection resources could have been pleaded in the Complaint had certain information contained in the records in the exclusive possession of the Fire Department been available to petitioners.[9] Petitioners have good reason to believe that release of the records would reveal factual circumstances clearly supporting their Complaint. For example, petitioners submit that the Fire Department has taken an unwarranted risk in selecting certain areas of the City consisting

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9. These records were requested in petitioners' April 16, 1982 Notice of Discovery, which was subsequently disallowed by the District Court. The Fire Department never has denied the existence of reports detailing results of studies and tests conducted by the Fire Department. *See* Complaint ¶¶23, 42-45.

predominantly of "fire-resistant" high rise office buildings to be protected by Engine Companies manned by four rather than five firefighters. The decision to incur this risk is unfounded for a number of reasons.

In the event of a fire in a high rise building, elevator service ceases. Thus, firefighters must carry water hoses and other equipment up many flights of stairs in order to combat the blaze. Undermanning markedly compounds the danger and difficulty of their task, particularly where the nature of the structure requires such additional duties to be performed. Additionally, a full complement of manpower in high rise buildings where elevator service has ceased would permit firefighters to assist the elderly, infirm or injured to safety.

Furthermore, petitioners submit that records in the exclusive possession of the Fire Department would reveal the irrationality, inefficiency and inequity inherent in the current organizational scheme for provision of fire protection services. Undermanning necessarily increases the risk of line-of-duty injury as well as the time for response to fire alarms, both of which result in decreased effectiveness of the Fire Department.[10]

In this case the rational basis test requires the courts to consider the unique circumstances before, during and after the

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10. For any given fire, certain Companies are designated as "first due" at the scene. Other Companies are on call as "second due," to be called into action in the event of a multiple alarm conflagration. These "second due" Companies, however, are designated as first due for fires within their Fire District. Upon information and belief, the Fire Department's records clearly demonstrate that undermanning lowers the threshold at which second due Companies will be called, because additional Companies are engaged for their manpower as well as their equipment. Thus, as a direct result of undermanning, other Fire Districts (even ones serviced by fully-staffed Companies) are left without adequate fire protection in the event of a multiple alarm fire in a neighboring district.

New York City fiscal crisis and necessarily entails fact questions which cannot be disposed of on a motion to dismiss addressed to the pleadings alone. Further inquiry, at a minimum, must be permitted unless this Court irrebutably presumes the existence of a rational basis for the City's actions. Such a holding would be inconsistent with the very existence of the rational basis test and would signal the unavailability of equal protection analysis to test actions where neither a fundamental right nor suspect class is involved.

The courts below apparently assumed that there was some other rational basis for the City's actions complained of herein. The lower courts knowingly ignored the procedural arguments set forth below, thereby sanctioning a departure from the accepted and usual course of judicial proceedings. Because a meaningful and fair examination of petitioners' constitutional claims was not undertaken below, and because the Second Circuit did not even address this crucial procedural defect even though it was briefed and argued, petitioners respectfully request that this Court grant a writ of certiorari to review the important questions presented in this action.

The District Court improperly granted respondents' Rule 12(b)(6) motion to dismiss after having previously relieved respondents of the necessity for complying with petitioners' outstanding Rule 34 Notice and Request for Documents and after accepting an affidavit of Assistant Corporation Counsel Marilyn Richter in connection with the purported Rule 12(b)(6) motion. Moreover, the District Court's decision tracks language from defense counsel's affidavit. The above circumstances indicate that the District Court permitted respondents to convert the Rule (12)(b)(6) motion to one for summary judgment under Rule 56. As a result, petitioners should have been allowed to develop a complete adversarial record, and their Notice of Discovery should not have been striken summarily by the lower court.

In the context of a Rule 12(b)(6) Motion to Dismiss, the trial court can consider only the contents of the pleadings. Furthermore, the allegations of the Complaint must be accepted as true. *Sterling National Bank v. Fidelity Mortgage Investors*, 510 F.2d 870, 875 (2d Cir. 1975). Thus, respondents' attorney's extraneous Affidavit, which contained material beyond the scope of the pleadings and which was not based upon affiant's personal knowledge, should not have been submitted to or considered by the District Court inasmuch as it was not a pleading.

The lower court's failure to permit discovery in the context of a Rule 56 motion constitutes reversible error as demonstrated below. The Second Circuit compounded this error by proceeding directly to the merits of the case without first examining the lack of procedural propriety which undermined petitioners' demonstration of the merits of their claims. Petitioners believe that the discovery they had properly requested would reveal factual circumstances clearly supporting their claims. (*See* paragraphs 42-45 of the Complaint regarding tests and studies conducted by the Fire Department which reveal a substantially greater level of firefighting effectiveness when a fifth person is assigned to each Engine Company.)[11] This position is given strong support by Mayor Koch's April 20, 1983 statement regarding the City's decision not to reduce manning levels (49a).[12] As demonstrated

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11. Hereinafter, all references to paragraphs in the Complaint will be denoted "Complaint ¶00."

12. It is respectfully requested that this Court take judicial notice of this statement of the Mayor, who is a named party in this lawsuit. An appellate court can take judicial notice on appeal of a fact which was not presented in the district court below. *See* Fed. R. Evid. 201(f); Richardson, *Evidence* (10th ed.) §14, citing *Hunter v. New York, Ontario & Western R.R. Co.*, 116 N.Y. 615 (1889). Furthermore, the Mayor's statement was presented in appellants' brief to the Second Circuit.

below, the District Court's inconsistent treatment of this case was unfair, contrary to law, and amounts to an "instance of judicial haste which in the long run makes waste." *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944).

The law pertinent to this issue was presented in *Conley v. Gibson*, 355 U.S. 41 (1957) and *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In *Conley*, this Court set forth the standard to be applied on a Motion to Dismiss:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. 355 U.S. at 45-46.

In *Scheuer*, this Court further explained the caution a court must exercise before dismissing on the bare pleadings, and held that the District Court's dismissal of the Complaint was inappropriate at this early stage of the litigation. The Court declared that:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the

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12. It is respectfully requested that this Court take judicial notice of this statement of the Mayor, who is a named party in this lawsuit. An appellate court can take judicial notice on appeal of a fact which was not presented in the court below. *See* Fed. R. Evid. 201(f); Richardson, *Evidence* (10th ed.) §14, citing *Hunter v. New York, Ontario & Western R.R. Co.*, 116 N.Y. 615 (1889).

> claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss . . . for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader. 416 U.S. at 236.

The above-cited propositions have often been applied in the Second Circuit. In *Geisler v. Petrocelli*, 616 F.2d 636 (2d Cir. 1980), the court declared that:

> As has been frequently reiterated, the office of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof. As formulated in *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 101, 2 L.Ed.2d 80 (1957), a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *See generally* 2A Moore's Federal Practice ¶12.08 (2d ed. 1979). 616 F.2d at 639.

Thus, the issue on a Motion to Dismiss is restricted to whether petitioners are entitled to offer evidence to support their claims. As noted by the *Scheuer* Court, the inquiry is limited to the face of the pleadings. Petitioners, in their Memorandum of Law below, accordingly requested that the lower court not consider Ms. Richter's extraneous Affidavit. The District Court, however, received and considered the Richter Affidavit in connection with its adjudication of respondents' motion, and such consideration

is reflected in the District Court's Opinion. This Affidavit was improper in that it went beyond the scope of the Complaint and placed before the District Court what must necessarily be speculative and hypothetical rationales in an attempt to justify the disparate provision of fire protection services complained of in this case. Petitioners submit that the District Court's determination that the Complaint "borders on the frivolous" would not have been made had Ms. Richter's Affidavit not been considered. Consideration of such an extraneous Affidavit is impermissible in the context of a Rule 12(b)(6) motion.

The importance of all parties being afforded an equal opportunity to develop evidence is apparent in the structure of Rule 56. Under Rule 56(c), the adverse party may serve opposing Affidavits prior to the hearing on summary judgment. A judgment shall be rendered only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c). In addition, Rule 56(e) allows Affidavits to be supplemented or opposed by depositions, Answers to Interrogatories, or further Affidavits. Furthermore, Rule 12(b)(6) provides that if the motion is converted to one for summary judgment under Rule 56, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[13] Here, no such discovery was permitted by the court.

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13. The Notes of the Advisory Committee on Rules accompanying Rule 12 are instructive concerning the treatment of motions such as that involved here. The Committee notes that some courts have held that "as the rule by its terms refers to statements in the complaint, extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it." Notes accompanying 28 U.S.C. 12, 1946 Amendment. The Second Circuit has suggested that the motion may be treated as a motion for summary judgment. *Id.*, and cases cited therein. The Committee entertains the view that on a Rule

(Cont'd)

Thus at the least, the District Court acted prematurely by relieving respondents of the necessity for complying with petitioners' Rule 34 Request for Documents as of the April 19, 1982 conference, nearly a month in advance of when respondents' Motion to Dismiss was served, and by dismissing the Complaint prior to development of a full adversarial record.

A review of cases arising under Rule 56 supports the Committee's view regarding allowance of extraneous proof by both parties when converting a Rule 12(b)(6) motion into a Rule 56 summary judgment motion. In *Johnson v. Jumelle,* 64 F.R.D. 708 (S.D.N.Y. 1974), defendants moved to dismiss pursuant to Rule 12(b). The court declared that "[t]he motion is treated as one for summary judgment under Rule 56, F.R. Civ. P. 12(c), since the parties have submitted exhibits and affidavits outside

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(Cont'd)
12(b)(6) motion, the trial court may permit introduction of extraneous matter and treat it under Rule 56: "Where extraneous matter is received, by tying further proceedings to the summary judgment rule the courts have a definite basis in the rules for disposing of the motion." *Id.* When the court receives extraneous material and converts the motion to dismiss to a motion for summary judgment, however, it must do so for both sides, in order to develop a complete record setting forth the positions of the respective parties:

> The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12(b)(6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, *the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs* to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment. *Id.* (emphasis supplied).

the pleadings which we have considered." *Id.* at 710. Significantly, the stated basis for the conversion to summary judgment treatment was that both parties had submitted extraneous proof permitting judicial consideration beyond the level of a Motion to Dismiss. *See also, Muhammad Ali v. Division of State Athletic Commission,* 308 F. Supp. 11, 15 n.3 (S.D.N.Y. 1969). Similarly, in *May v. Finn,* 200 F. Supp. 246 (E.D.N.Y. 1961), the court noted at the outset:

> Both the plaintiff and the defendant have submitted affidavits which include matters outside the complaint. Hence, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., I shall treat the motion as one for summary judgment under Rule 56 of said Rules. 200 F. Supp. at 247.

In addition to the impropriety inherent in the District Court's treatment of the motion under consideration, its inconsistency in allowing an extraneous affidavit on behalf of one side yet disallowing discovery to the other was patently unfair. In *Gordon v. National Youth Work Alliance,* 675 F.2d 356 (D.C. Cir. 1982), the court explained that:

> . . . under Rule 12(b)(6) the court may not consider matters outside the pleadings and accompanying legal memoranda without converting the motion into one for summary judgment and affording *all parties* "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).
>
> * * *
>
> Fairness, not excessive technicality, is the guiding principle under . . . the Federal Rules of

> Civil Procedure. The mandatory language in which Rule 12(b)'s proviso is couched underscores the importance of providing plaintiffs with the essential safeguards of summary judgment procedure whenever they face a motion to dismiss that turns on questions of fact.
>
> • • •
>
> The importance of fair procedures in factfinding at any stage requires this approach, whether or not the parties invoke the precise words in the Federal Rules. Under either Rule 12(b)(1) or Rule 12(b)(6), a court need not consider matters outside the pleadings at all. But *once it decides to consult such matters it should so inform the parties and set a schedule for submitting additional affidavits and documents if the parties wish.*
>
> Accordingly, since the District Court did not so notify the parties, we may sustain the dismissal only if it meets the *stringent standard for dismissal without regard to matters outside the pleadings* . . . 675 F.2d at 360-61. (emphasis supplied).

Thus the *Gordon* court restricted itself to Rule 12(b)(6) consideration of the pleadings in view of the district court's failure to allow extraneous proof by both sides, and accordingly reversed the lower court's dismissal of the Complaint.

A similar result obtained in *Sarkees v. Wright & Kremers, Inc.*, 433 F. Supp. 705 (W.D.N.Y. 1977), where defendant offered an affidavit of one of its corporate officers in support of its Rule 12(b)(6) motion to dismiss. The court stated that:

> Such an affidavit goes beyond the pleadings and is not properly to be considered when weighing a motion to dismiss. The only exception is when such a motion under rule 12(b)(6) is treated as a motion for summary judgment and then only if all parties shall be given reasonable opportunity to present all materials pertinent to such motion pursuant to Rule 56. 433 F. Supp. at 707.

The court refused to convert the motion to one for summary judgment to avoid inequity to the plaintiff, who had not been afforded an opportunity to present extraneous proof. Accordingly, the court denied the motion.

It is clear from the foregoing that a motion such as that presented herein must be treated *either* as a Rule 12(b)(6) motion to dismiss directed solely to the pleadings, *or* as a Rule 56 motion for summary judgment, based on a record developed through full and fair opportunity for both sides to present extraneous proof. This position is supported by the language of the Federal Rules, by the Advisory Committee Notes pertaining thereto, by the relevant case law, as well as by traditional notions of fairness to litigants. Accordingly, in view of the patently inconsistent treatment afforded this motion by the District Court, it is respectfully requested that this Court grant a writ of certiorari to review the questions presented in this action.

B. The Complaint states a cause of action under the Due Process Clause of the Fourteenth Amendment and should not have been dismissed especially where, as here, the courts below precluded petitioners from conducting any discovery.

The first claim for relief in the Complaint is premised on the Due Process Clause of the Fourteenth Amendment. Complaint ¶49. Petitioners' substantive and procedural rights under the Due

Process Clause have been, and are being, violated by the action of respondents in failing to provide adequate fire protection.

The requirement under equal protection theory that a right, to be fundamental, must arise explicitly or implicitly from the Constitution precludes meaningful scrutiny of actions which infringe essential, although perhaps not fundamental, rights. Procedural and substantive due process analysis, on the other hand, was fashioned to protect the rights sought to be protected here.

1. Procedural Due Process

Procedural due process protection under the Fourteenth Amendment attaches where a claimant demonstrates a property right which has been infringed without adequate process. Since this Court, for the purposes of this motion, must assume that the fire protection afforded petitioners is inadequate, the only issues to be considered are the existence of a property interest in such protection in the first instance and what procedural safeguards are necessary to protect that interest.

A property interest may arise from many sources beyond the Constitution, including state statutory and decisional law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *See also, Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Escalera v. New York City Housing Authority*, 425 F.2d 853, 861 (2d Cir. 1970). Here, petitioners' claim of entitlement to adequate fire protection rests on statutes which mandate the provision of fire protection by the City. N.Y.G.C.L. §20(12) grants the City the absolute power ". . . [t]o prevent and extinguish fires and to protect the *inhabitants* of the City and property within the City from loss or damage by fire or other casualty." (Emphasis added.) The City assumes this duty and explicitly excludes all others from its

performance in N.Y.C. Charter §487 which provides that the New York City Fire Department has ". . . the sole and exclusive power and authority to extinguish fires at any place within the jurisdiction of the City. . . ." Thus, citizens must rely exclusively upon the City to perform adequately its duty to protect their personal property and physical security from fire.

The Second Circuit's reliance on a clause in New York City Administrative Code §1173-4.3(b) to justify the reduction of five firefighter per tour manning levels is misplaced (3a). This clause states that the City is empowered ". . . to relieve its employees from duty because of lack of work or for other legitimate reasons. . . ." Under the established facts of this case, however, it is clear that the City initially relieved the firefighters for fiscal reasons, not because of lack of work. The Fire Department is not, and has never been overmanned or lacked work for its firefighters. To the contrary, upon information and belief, the tests and studies conducted by the Fire Department demonstrate the need for the greater efficiency of five firefighter manning. Furthermore, there was a less restrictive alternative means to satisfy any budgetary restrictions which might have previously existed: a reduction of the workforce could have been accomplished, if necessary, by reducing the number of Engine Companies, rather than by cutting the manning levels of each Company. In short, fewer fully staffed Companies would have been more effective than more undermanned Companies.

Once the budget crisis abated, however, it became all the more clear that there were no grounds for claiming any "legitimate reason" or rational basis for maintaining the inadequate, unsafe and inefficient four firefighter levels. This is especially true in light of other clauses within §1173-4.3(b), which the Second Circuit did not cite, which mandate that the City must ". . . maintain the efficiency of governmental operations. . ." and ". . . take all necessary actions to carry out its mission in emergencies. . . ."

Few governmental operations are more crucial to the inhabitants of the City than effective performance of the Fire Department's exclusive role in protecting life and property in the event of fire emergencies.

Petitioners' procedural due process argument concededly presents this Court with a case of first impression because courts have never decided whether the statutes involved in this case vest a protectible property interest in firefighters or the public to adequate fire protection. In this case, N.Y.G.C.L. §20(12), which empowers the City to protect its *inhabitants* from fire casualty, along with the City's assumption of this duty to its inhabitants to the exclusion of all others, fully supports petitioners' claim of entitlement.[14]

Having established a due process right to adequate fire protection, the next inquiry regards what process is required before this right can be circumscribed. As held in *Matthews v. Eldridge*, 424 U.S. 319 (1976), the form, extent and timing of the process requirement is dictated in part by the magnitude of the potential deprivation. The due process requirements must also be consistent with effective and efficient decision making and administration. It is submitted that these considerations require an opportunity for community input prior to the deprivation.

In short, this Court must, in the context of the Rule 12(b)(6) motion, assume that the fire protection afforded petitioners is

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14. The significance of this statutory provision is underscored by the absence of any private force among the firefighters, a unique situation among services provided to the public by the City. The City has undertaken to perform this duty; thus there must be a mechanism to compel its adequate performance. Otherwise, City inhabitants are in the anomolous position of having surrendered their safety to the body politic without retaining the means for compelling its adequate protection.

inadequate. The issue, thus, is whether petitioners must be compelled to suffer this inadequacy which threatens their lives until the slow moving political process reacts or whether these individuals are entitled to be heard. Where, as here, the danger is great and imminent, and the reliance on the City total, at a minimum, these individuals must be given meaningful input to the decision making process.

2. Substantive Due Process

The first claim for relief in the Complaint also states a cause of action under substantive due process analysis. The Due Process Clause of the Fourteenth Amendment not only assures individuals of procedural protection before a property interest may be infringed, but it also requires that any government action which limits or denies a fundamental constitutional right be justified by a compelling state interest.

The interests of life, liberty and property protected by substantive due process have been broadly defined. *Board of Regents v. Roth,* 408 U.S. 572 (1972); *Meyers v. Nebraska,* 262 U.S. 390 (1923). Included within the definition of liberty is the notion that an individual must be free from unjustified intrusions on personal security. *Ingraham v. Wright,* 430 U.S. 651, 673 (1977). This liberty interest is infringed not only when bodily restraint or punishment is involved, but when an action of the state, or of one acting under color of its authority, subjects an individual to unnecessary and unjustified exposure to danger or injury. *White v. Rochford,* 592 F.2d 381 (7th Cir. 1979).

White recognizes the substantive right to be free from unnecessary and unjustified intrusions on physical security in a factual setting analogous to that of this case. The intrusion in both cases is not the result of an affirmative act, but rather of a failure to act, when protection of the rights in question call

for action. Here, petitioners are entirely dependent upon the City for fire protection and are foreclosed from self-help. Thus, the City's failure to provide adequate fire protection infringes petitioners' liberty interest to be free from unjustified harm.

Respondents' actions which infringe upon petitioners' liberty interest must be justified by a compelling state interest. This test, enunciated in *Roe v. Wade*, 410 U.S. 113 (1973), attempts to ensure that such compelling state interest is served in a fashion that impacts least on the rights affected. *Griswald v. Connecticut*, 381 U.S. 479, 485 (1965).[15]

Respondents have failed to demonstrate that any compelling interest is served by the City's omission of adequate fire protection. Respondents merely attempt to hypothesize possible rational bases for the level of fire protection provided, under the mistaken belief that the complaint seeks redress only under the Equal Protection Clause.

To conclude, petitioners seek, through the Equal Protection and Due Process Clauses of the Fourteenth Amendment, to protect their most vital interest, the security and health of themselves and their families. This lawsuit constitutes the only recourse available to petitioners. To dismiss this action before even a cursory analysis of the merits smacks of abdication of the proper function of the District Court. Further, respondents' attorney's affidavit

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15. Should this Court refuse to recognize a fundamental liberty interest in personal security, respondents are nonetheless required, under *Kelley v. Johnson*, 473 U.S. 238 (1978), to demonstrate at least a rational basis for the infringement of the liberty interest involved. The intrusion on petitioners' liberty interest cannot be arbitrary. Here, as with the equal protection rational basis test, judgment on the pleadings is inappropriate unless this Court adopts an irrebuttable presumption in this and in all cases that the actions of the City are founded upon a rational basis.

suggesting possible rational bases is improper because it goes beyond the pleadings to the merits and is based entirely on speculation unsupported by personal knowledge.[16] At the lowest level of scrutiny, this action, under both equal protection and due process analysis, involves a rational basis test. This is necessarily a fact question. As stated above, unless this Court creates an irrebuttable presumption of the rationality of the City's acts, the lower courts' dismissal must be vacated.

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16. It is interesting to note in this connection, that having decided to address the merits in their supporting affidavit, respondents chose not to supply an affidavit from Fire Commissioner Hynes, the individual in the best position to know the facts and who, upon information and belief, based on these facts, recommended elevating the manning in some or all of the undermanned Engine Companies. *See* Complaint ¶45.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted in this case.

Respectfully submitted,

JOHN F. MILLS

COLLERAN, O'HARA,
KENNEDY & MILLS, P.C.
Attorneys for Petitioners

JOHN F. MILLS
Counsel of Record

ROBERT A. KENNEDY
Of Counsel

APPENDIX

OPINION OF THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

Second Circuit

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Present:

Hon. James L. Oakes
Hon. Thomas J. Meskill,
Circuit Judges.
Hon. Irving Hill,
District Judge.*

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of June, one thousand nine hundred and eighty three

83-7071

Nicholas Mancuso, Dorothy A. Kennedy, May Smith, Shelly Goldfeder, Dorothy S. Kennedy, Bruce I. Giammattei, Virginia Hayes, Richard L. Iadarola, Ignacio F. Manieri, Nick DeGaeta, John J. McCluskey, Louis C. Call and Kenneth Ellis, individually and on behalf of the class and subclasses of similarly situated persons,

Appellants,

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* Of the United States District Court for the Central District of California, sitting by designation.

v.

The City of New York, et al.,

Appellees.

ORDER

This appeal is taken from a judgment of the United States District Court for the Southern District of New York, Thomas P. Griesa, Judge, dismissing plaintiffs' complaint for failure to state a claim on which relief may be granted. We affirm. The plaintiffs contend that New York City's decision to cut the staffing of some of its firefighting companies from five persons to four violated their Fourteenth Amendment rights to equal protection and due process.

The plaintiffs' claim is noteworthy less for what it claims than for what it concedes. They do not allege that there is a constitutionally cognizable fundamental right to the services of which they have been deprived. Nor do the plaintiffs argue that they are members of a suspect class, deprived either by the designs or the effects of some rule on their group from obtaining the equal protection of the laws. With neither of the prongs of heightened equal protection scrutiny available to them, the plaintiffs must argue that the City's classification of certain areas as deserving only four-person fire crews is not rationally related to a legitimate government objective. Yet the plaintiffs acknowledge in their pleadings that the City has reduced its firefighting force "[d]ue . . . to budgetary deficits." Joint Appendix at 15a, ¶22. The plaintiffs nowhere allege that reducing the deficit is an illegitimate governmental aim or that the City's reduction of its firefighting force will not save money. The only possible remaining objection is that the City irrationally chose

not to distribute the reductions evenly among all firecrews but a decision to cut back some areas to four-person companies while others are only cut to five is defensible because firefighters cannot be purchased in increments smaller than one. Because there is a rational basis for the City's decision, the plaintiffs equal protection argument is without merit. *See Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1203 (2d Cir. 1977).

The plaintiffs' due process claims are no more credible. They suggest that they have a due process property and liberty right to five-firefighter companies based on the entitlement to fire protection created by the City's laws. But the cited laws create no such expectation or entitlement either by their terms nor by their operation. New York General City Law §20(12) gives the City the power "to prevent and extinguish fires," and New York City Charter §487 gives the Fire Department the "sole and exclusive power and authority to extinguish fires at any place within the . . . city . . . ." The contention that this language requires the Fire Department to extinguish fires in the city is to mistake a power for a duty. To contend that this fancied general duty, even if it existed, creates the specific constitutional requirement of an additional firefighter in four-person companies is to mistake the Constitution for a wish list. Moreover, New York City Administrative Code §1173-4.3(b) specifically empowers the City "to relieve its employees from duty because of lack of work or for other legitimate reasons. . . ." Any ambiguities in the State and City fire laws that would mislead the plaintiffs to expect that

New York City may only increase the size of its firefighting force is cleared up entirely by this provision of its Code.

Judgment affirmed.

s/ James L. Oakes
Circuit Judge.

s/ Irving Hill
District Judge.

s/ Thomas J. Meskill
Circuit Judge.

OPINION AND JUDGMENT OF THE DISTRICT COURT (DECEMBER 1982)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 1777

NICHOLAS MANCUSO, DOROTHY A. KENNEDY, MAY SMITH, SHELLY GOLDFEDER, DOROTHY S. KENNEDY, BRUCE T. GIAMMATTEI, VIRGINIA HAYES, RICHARD L. IADAROLA, IGNACIO F. MANIERI, NICK DeGAETA, JOHN J. McCLUSKEY, LOUIS C. CALL and KENNETH ELLIS, individually and on behalf of the class and subclasses of similarly situated persons,

Plaintiffs,

v.

THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as President of the City Council, NEW YORK CITY FIRE DEPARTMENT, CHARLES J. HYNES, individually and as Fire Commissioner of the City of New York,

Defendants.

GRIESA, J.

This is a purported class action brought on behalf of certain New York City firemen and residents. The complaint seeks to require New York City to maintain a staffing level of 5 firemen in engine companies where there are presently only 4 firemen. According to the complaint, prior to 1971 a large number of engine

companies were manned with 4 firemen per tour plus one officer. At some point thereafter the standard staffing was increased to 5 or more firemen. Then, due to budgetary problems, the City reduced all but 42 companies to staffing levels of 4 firemen. In 1978 and 1979 there was some augmentation, so that staffing levels were increased to 5 firemen in all but 71 companies. The complaint alleges that engine companies with only 4 firemen are undermanned and incapable of providing a "minimum level of required fire protection."

Plaintiffs base their action on the Due Process and Equal Protection Clauses of the Federal Constitution.

Defendants have moved to dismiss. The motion is granted.

The complaint fails to state a claim upon which relief can be granted. It borders on the frivolous. The question of the level of fire protection in New York City is a matter to be decided by the City government and ultimately by the political process. The complaint itself alleges that, over the years, staffing has varied from time to time, and from company to company. There is no allegation of anything which could make the matter of a staffing level of 4 firemen amount to a federal constitutional question on any theory.

The action is dismissed.

So ordered.

Dated: New York, New York
December 16, 1982

s/ Thomas P. Griesa
U.S.D.J.

Opinion and Judgment of the District Court

SOUTHERN DISTRICT OF NEW YORK

82 Civil 1777 (TPG)

NICHOLAS MANCUSO, et al

Plaintiffs

-against-

THE CITY OF NEW YORK, et al

Defendants

JUDGMENT

Defendant(s) having moved for an order dismissing the complaint, and the said motion having come before the Honorable Thomas P. Griesa, United States District Judge, and the Court thereafter on December 16, 1982, having handed down its opinion (#54048) granting the said motion, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

Dated: New York, N.Y.
December 21, 1982

s/ Raymond F. Burghardt
Clerk

SUMMONS AND COMPLAINT DATED MARCH 22, 1982

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 1777

NICHOLAS MANCUSO, DOROTHY A. KENNEDY, MAY SMITH, SHELLY GOLDFEDER, DOROTHY S. KENNEDY, BRUCE T. GIAMMATTEI, VIRGINIA HAYES, RICHARD L. IADAROLA, IGNACIO F. MANIERI, NICK DeGAETA, JOHN J. McCLUSKEY, LOUIS C. CALL and KENNETH ELLIS, individually and on behalf of the class and subclasses of similarly situated persons,

Plaintiffs,

v.

THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as President of the City Council, NEW YORK CITY FIRE DEPARTMENT, CHARLES J. HYNES, individually and as Fire Commissioner of the City of New York,

Defendants.

CLASS ACTION SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon COLLERAN, O'HARA, KENNEDY & MILLS, P.C., plaintiff's attorney, whose address 1044 Franklin Avenue, Garden City, New York 11530-2960 an answer to the complaint which is herewith

served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Raymond F. Burghardt
Clerk of Court

(Illegible)
Deputy Clerk

Dated March 22, 1982

Summons and Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NICHOLAS MANCUSO, DOROTHY A. KENNEDY, MAY SMITH, SHELLY GOLDFEDER, DOROTHY S. KENNEDY, BRUCE T. GIAMMATTEI, VIRGINIA HAYES, RICHARD L. IADAROLA, IGNACIO F. MANIERI, NICK DeGAETA, JOHN J. McCLUSKEY, LOUIS C. CALL and KENNETH ELLIS, individually and on behalf of the class and subclasses of similarly situated persons,

Plaintiffs,

v.

THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as President of the City Council, NEW YORK CITY FIRE DEPARTMENT, CHARLES J. HYNES, individually and as Fire Commissioner of the City of New York,

Defendants.

CLASS ACTION COMPLAINT
PRELIMINARY STATEMENT

1. This is a civil action for declaratory and injunctive relief pursuant to 28 U.S.C. Sections 2201 and 2202, respectively, to protect plaintiffs herein and the class and subclasses which they represent from the deprivation of certain rights, privileges and immunities secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Injunctive relief is sought to: (a) restrain the defendants from continuing the policies, rules, regulations and

practices currently in force which result in the provision of less than adequate fire protection in various Fire Districts in the City of New York (hereinafter "the City") so as to endanger and impair substantially the security of the lives, persons and property of plaintiffs and the class and subclasses which they represent; (b) to implement the recommendations which, upon information and belief, were made by the Fire Commissioner of the City (hereinafter "the Commissioner") to the Mayor of the City (hereinafter "the Mayor") to increase the manning requirements in 71 Engine Companies of the Fire Department of the City from four (4) firefighters per tour to five (5) firefighters per tour in order to bring the efficiency of such Engine Companies up to the minimum level required to provide adequate fire protection commensurate with the fire protection afforded in the other Fire Districts of the City which are serviced by the remaining 139 Engine Companies; and (c) restrain the defendants from continuing the policies and practices which have resulted in a failure to provide and allocate on a rational basis firefighting resources to the Fire Districts serviced by the 71 four-firefighter per tour Engine Companies (hereinafter sometimes referred to as "undermanned Engine Companies").

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1343(3) providing for jurisdiction in this Court for an action to redress the deprivation, under color of state law, of rights, privileges and immunities guaranteed by the Constitution of the United States and by 28 U.S.C. Section 1331 providing for jurisdiction in this Court for an action arising under the Constitution of the United States. This is a civil action brought under 42 U.S.C. Section 1983 barring the deprivation under color of state law, state law, statute, ordinance, regulation, custom, usage or policy of rights, privileges and immunities secured by

the Fourteenth Amendment to the Constitution of the United States.

CLASS ACTION ALLEGATIONS

3. Plaintiffs bring this action as a class action under Fed. R. Civ. P. 23 as more fully set forth below.

4. All plaintiffs designated in paragraph "13" are members of a class containing in excess of 1,500,000 members who either reside or are employed in Fire Districts within the City which are assigned four-firefighter per tour Engine Companies.

5. Plaintiffs designated in paragraph "13" sections "A", "F", "G", "H" and "J" are members of a subclass containing in excess of 250,000 members who either reside or are employed in Fire Districts assigned four-firefighter per tour Engine Companies which are housed without a Ladder Company (hereinafter "subclass A").

6. Plaintiffs designated in paragraph "13" sections "H", "I", "J", "K", "L" and "M" are members of a subclass containing in excess of 1,400 members who are firefighters assigned to Engine Companies in which four-firefighters per tour Engine Company manning is in force (hereinafter "subclass B").

7. This action is maintainable by the class and subclasses alleged herein pursuant to Fed. R. Civ. P. 23(a), 23(b)(1) and 23(b)(2).

8. As required by Fed. R. Civ. P. 23(a): (i) the class and subclasses are so numerous that joinder of all members is impracticable; (ii) as shown below at paragraphs "11" and "12", there are questions of law and fact common to the class and

subclasses; (iii) the claims of the plaintiffs are typical of the claims of the class and subclasses and (iv) the plaintiffs will fairly and adequately protect the interests of the class and subclasses in that the plaintiffs are similarly situated with the class and subclasses they represent with regard to the risk of harm caused by the defendants herein.

9. As required by Fed. R. Civ. P. 23(b)(1): (i) the prosecution of separate actions by individual members of the class or subclasses would create a risk of inconsistent or varying adjudications with respect to individual members of the class or subclasses which would establish incompatible standards of conduct for the defendants herein, or the adjudications with respect to individual members of the class or subclasses would, as a practical matter, be dispositive of the interests of the other members of the class or subclasses not parties to the adjudications or substantially impair or impede their ability to protect their interests.

10. As required by Fed. R. Civ. P. 23(b)(2), the defendants have acted and/or refused to act on grounds generally applicable to the class and subclasses thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class and subclasses as entities.

11. The common questions of fact with regard to the class and subclasses are the following:

a) The adequacy of the fire protection afforded to the residents and working people in the 71 undermanned Fire Districts.

b) The comparative efficiency of five-firefighter Engine Companies as opposed to four-firefighter Engine Companies in fighting fires.

c) The increased risk of harm, injury, death and property loss imposed upon residents and working people within the Fire Districts assigned undermanned Engine Companies and, with particular regard to subclass A, such increased risks imposed upon residents and working people within the Fire Districts assigned undermanned Engine Companies which are not housed with a Ladder Company.

d) The workload impact imposed upon firefighters assigned to undermanned Engine Companies and the effect such impact has on the firefighting efficiency of such undermanned Engine Companies, and, with particular regard to subclass B, the effect such impact has on the risk of line of duty injury or death.

12. The common questions of law with regard to the class and subclasses are the following:

a) The existence of a legally cognizable right to adequate fire protection.

b) The existence of a legally cognizable right of the plaintiffs herein to fire protection commensurate with the protection afforded the residents and working people within the 139 Fire Districts protected by five-firefighter per tour Engine Companies.

c) The constitutionality of the level of fire protection afforded the plaintiffs within the Fire

Districts covered by the 71 undermanned Engine Companies.

d) The constitutionality of the disparate level of fire protection afforded the plaintiffs within the Fire Districts covered by the 71 undermanned Engine Companies.

e) The appropriateness of relief to be ordered on behalf of the class and subclasses.

PARTIES

13. The plaintiffs in this action are:

A. Nicholas Mancuso, who resides at 565 Logen Avenue, Bronx, New York and has resided in such section of Throgs Neck for a period of 25 years. Such Fire District is covered by Engine Company 89, an undermanned Engine Company. Mr. Mancuso is President of the Uniformed Firefighters Association, an association of 8,669 members whose office is located at 225 Broadway, New York, New York. Such Fire District is covered by Engine Company 10, an undermanned Engine Company which is housed without Ladder Company. Mr. Mancuso is a member of the class and a member of subclass "A".

B. Dorothy A. Kennedy, who resides at 445 East 77th Street, New York, New York and has resided in such section of the upper East Side for a period of 23 years. Although her residence address is covered by Engine Company 44, which is a five-firefighter per tour Engine Company, her place of employment, which is the Archdiocese of New York, located at 1011 First Avenue, New York, New York, is in a Fire District covered by Engine Company 8, an undermanned Engine Company. Dorothy A. Kennedy is a member of the class.

C. May Smith, who resides at 47-02 190th Street, Flushing, New York and has resided in such section of Flushing for 15 years. Such Fire District is covered by Engine Company 24, an undermanned Engine Company. May Smith is a member of the class.

D. Shelly Goldfeder, who resides at 58 Clara Street, Brooklyn, New York and has resided in such section of Borough Park for over fifteen years. Such Fire District is covered by Engine Company 282, an undermanned Engine Company. Mr. Goldfeder also is an officer of Contact Printing, Inc. located at 505 Broadway, New York, NY. Such Fire District is covered by Engine Company 24, an undermanned Engine Company. Mr. Goldfeder is a member of the class.

E. Dorothy S. Kennedy, who resides at 70 East 10th Street, New York, New York and has resided in such section of the East Village for 20 years. Such Fire District is covered by Engine Company 33, an undermanned Engine Company. Dorothy S. Kennedy is a member of the class.

F. Bruce I. Giammattei, who resides at 55 Austin Place, Staten Island, New York and has resided in the New Brighton-Stapleton area for over two years. Such Fire District is covered by Engine Companies 153 and 155, both of which are undermanned Engine Companies. Mr. Giammattei is also employed at 14 Wall Street in lower Manhattan. Such Fire District is covered by Engine Company 10, an undermanned Engine Company housed without a Ladder Company. Mr. Giammattei is a member of the class and a member of subclass "A".

G. Virginia Hayes, who resides at 41-37 67th Street, Woodside, New York and has resided in such section of Queens for a period of 15 years. Such Fire District is covered by Engine

Company 292, an undermanned Engine Company housed without a Ladder Company. Her place of employment, the Archdiocese of New York, located at 1011 First Avenue, New York, New York, is in the Fire District covered by Engine Company 8, also an undermanned Engine Company. Virginia Hayes is a member of the class and a member of subclass "A".

H. Richard L. Iadarola, who resides at 47-08 188th Street, Flushing, New York. Such Fire District is covered by Engine Company 299, an undermanned Engine Company. He is also employed as a Firefighter by the Fire Department and has been assigned for the last four (4) years to Engine Company 272 in Queens, which is an undermanned Engine Company housed without a Ladder Company. Mr. Iadarola is a member of the class and subclasses "A" and "B".

I. Ignacio F. Manieri, who resides at 2063 Brown Street, Brooklyn, New York. Such Fire District is covered by Engine Company 321, a five-firefighter per tour Engine Company. However, he is employed as a Firefighter by the Fire Department and has been assigned for the last 25 years to Engine Company 323 in Brooklyn which is an undermanned Engine Company. Mr. Manieri is a member of the class and a member of subclass "B".

J. Nick DeGaeta, who resides at 67 Cannon Boulevard, Staten Island, New York. Such Fire District is covered by Engine Company 165, an undermanned Engine Company. He is also employed as a Firefighter by the Fire Department and has been assigned for the last 28 years to Engine Company 10 in Manhattan which is an undermanned Engine Company housed without a Ladder Company. Mr. DeGaeta is a member of the class and a member of subclasses "A" and "B".

K. John J. McCluskey, who resides at 725 Eleventh Avenue, New York, New York. Such Fire District is covered by Engine

Company 54, an undermanned Engine Company. He is also employed as a Firefighter by the Fire Department and has been assigned for the last 10 years to Engine Company 54. Mr. McCluskey is a member of the class and a member of subclass "B".

L. Louis C. Call, who resides at 15 Leeside, Carmel, New York. He is employed as a Firefighter by the Fire Department and has been assigned for the last 8 years to Engine Company 66 in the Bronx which is an undermanned Engine Company. Mr. Call is a member of the class and a member of subclass "B".

M. Kenneth Ellis, who resides at 95 Dale Avenue, Staten Island, New York. Such Fire District is covered by Engine Company 165, an undermanned Engine Company. He is also employed as a Firefighter by the Fire Department and has been assigned for the last 12 years to Engine Company 165. Mr. Ellis is a member of the class and a member of subclass "B".

14. The defendants in this action are:

A. The City of New York.

B. Edward I. Koch, individually and in his official capacity as Mayor of the City of New York. Mr. Koch is the Chief Executive Officer of the City and as such is responsible for drafting the annual capital and expense budgets for the City. He also has the power to disapprove or veto any changes in the budget by the Board of Estimate or the City Council, including the Fire Department budget.

C. Carol Bellamy, individually and in her official capacity as the President of the New York City Council. The City Council is vested with the legislative power of the City and has the power

to increase, decrease or omit any unit or appropriation in the budget, including the Fire Department budget, as submitted by the Mayor or add to any unit or appropriation thereto or to add, omit or change any terms or conditions thereof. The President of the City Council presides over the meetings of the Council. The President of the City Council is also a member of the Board of Estimate which also has the power to make changes in the budget as submitted by the Mayor.

D. The New York City Fire Department.

E. Charles J. Hynes, individually and in his official capacity as the Commissioner of the Fire Department. In this capacity, it is his responsibility and duty to manage, care for and maintain the provision of fire protection services in the City, including the management, allocation and operation of all personnel and equipment of the Fire Department.

FACTUAL ALLEGATIONS

15. Pursuant to N.Y. Gen. City Law §20(12) New York State has delegated to the City the power ". . .To prevent and extinguish fires and to protect the inhabitants of the City and property within the City from loss or damage by fire or other casualty."

16. The City assumed the aforementioned power pursuant to Section 487 of the New York City Charter and Chapter 19, Title A, of the New York City Administrative Code which provide that the New York City Fire Department (hereinafter "Fire Department") has ". . . the sole and exclusive power and authority to extinguish fires at any place within the jurisdiction of the City. . . ." No private citizen or group of private citizens in the City may lawfully impinge upon, or exercise, any of the power

and authority thus vested solely and exclusively in the Fire Department.

17. The Fire Department firefighting and fire prevention services are carried out by the Bureau of Fire. There are within that Bureau twelve (12) different geographical Divisions. Each Division has three to five Battalions aggregating 53. In each Battalion, there are usually four to eleven Fire Companies, totaling 353 throughout the City. Two hundred ten (210) of the Fire Companies are Engine Companies which carry hose, pumping devices and personnel. One Hundred thirty-eight (138) Fire Companies are Ladder Companies which carry ladders, hooks, axes and personnel. There are four (4) Rescue Companies and one (1) Squad Company which perform specialized functions. Companies are located in quarters housing from one to three Fire Companies. Seventy-five (75) of the 210 Engine Companies are quartered with a Ladder Company. Each Fire Company generally has its separate administrative and fire district within which the quarters are located.

18. Company personnel usually consist of twenty to twenty-five firefighters, three (3) Lieutenants and one (1) Captain. Each Company platoon is supervised by a Lieutenant, and each entire Company is supervised by a Captain who also serves as a platoon supervisor during his tour of duty. Each Battalion is supervised by a Battalion Chief and each Division by a Deputy Chief. The Bureau of Fire is directed by the Chief of the Department. The most recent roster for the foregoing personnel, including limited service and administrative personnel, is as follows:

	1980
Firefighters	8669
Lieutenants	1437

Captains	503
Battalion Chiefs	270
Deputy Chiefs	91
Chief	1
	10,971

19. Every resident of, and visitor to, the City is and has been exclusively dependent upon the Fire Department to protect their lives, persons and property from destruction, impairment, loss or damage resulting from fire. The provision of fire protection by the Fire Department is fundamental and essential to the security and order of the society comprised of the citizens of this City.

20. Prior to 1971, a large number of Engine Companies were manned with four (4) firefighters per tour and an officer.

21. In 1971, the Fire Department determined that all Engine Companies throughout the City had to have at least five firefighters per tour and an officer to provide the minimum level of required fire protection. Accordingly, the City elevated the manning in all Engine Companies to that minimum level and in many Engine Companies, particularly those located in heavy workload Fire Districts, more than five firefighters per tour were assigned, along with an officer.

22. Due solely to the budgetary deficits experienced by the City during the mid-1970's, the City ordered on June 30, 1975 that the manning levels in all but 42 Engine Companies be reduced to four (4) firefighters per tour and an officer. In addition, during this same period of time 51 firefighting units were disbanded by the City.

23. Upon information and belief, studies produced by the Fire Department have revealed that manning Engine Companies

with four (4) firefighters per tour and an officer is insufficient to permit such Companies to perform efficiently their firefighting tasks and, thus, results in the inadequate provision of fire protection to the Fire Districts covered by such undermanned Companies.

24. Between July 1, 1977 and May 1, 1979, as the budgetary crisis abated, the City, upon information and belief, recognizing the imperativeness of assigning five (5) firefighters per tour to Engine Companies , systematically reinstated five (5) firefighters per tour to all but 71 of the Engine Companies.

25. Despite the remanning described in paragraph "24", the following 71 Engine Companies remain undermanned and, thus, incapable of providing the minimum level of required fire protection to the plaintiffs working and residing in the Fire Districts to which these Engine Companies are assigned:

Borough of Manhattan

Engine Co.	Address	Locale
1	142 W 31st St.	Herald Square Area
3	146 W 19th St.	Chelsea Area
7	100 Duane St.	City Hall Area
8	165 E 51st St.	Midtown (East)
10	124 Liberty St.	World Trade Center
16	234 E 29th St.	Murray Hill-Kips Bay
24	227 Sixth Ave.	Greenwich Village
33	42 Great Jones St.	East Village
34	440 W 38th St.	Hell's Kitchen-Clinton
40	131 Amsterdam Ave.	Lincoln Center Area
54	782 Eighth Ave.	Midtown (West)

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Borough of Bronx

66	21 Asch. Loop W	Co-Op City
89	2924 Bruckner Blvd.	Throgs Neck

Borough of Staten Island

151	7219 Amboy Rd.	Tottenville
153	74 Broad St.	Stapelton
155	14 Brighton Ave.	New Brighton
157	1573 Castleton Ave.	Port Richmond
161	278 McClean Ave.	South Beach
162	256 Nelson Ave.	Great Kills
163	875 Jewett Ave.	Westerleigh
164	1560 Drumgoole Rd.	West Hughenot
165	3076 Richmond Rd.	New Dorp.
166	1400 Richmond Ave.	Granitville

Borough of Brooklyn

202	31 Richards St.	Red Hook
205	74 Middagh St.	Bklyn Heights
241	6630 Third Ave.	Bay Ridge
243	8653-18th Ave.	Bensonhurst
245	2929 W Eighth St.	Coney Island
246	2732 E 11th St.	Sheepshead Bay
254	901 Avenue U	Gravesend
276	1635 E 14th St.	Midwood
279	252 Lorraine St.	Red Hook
282	4210-12th Ave.	Borough Park
284	1157-79th St.	Dyker Heights
309	1851 E 48th St.	Marine Park
318	2510 Neptune Ave.	Coney Island
323	6405 Avenue N	Mill Basin

Borough of Queens

258	10-40 47th Ave.	Long Island City
259	33-51 Greenpoint Ave.	Long Island City
261	37-20 29th St.	Long Island City
263	42-06 Astoria Blvd.	Astoria
264	16-15 Central Ave.	Far Rockaway
265	58-03 Rockaway Beach Blvd.	Arverne-Rockaway
268	257 Beach 116th St.	Rockaway Park
270	91-45 121st St.	Richmond Hill
273	40-18 Union St.	Flushing
274	41-20 Murray St.	Flushing
285	103-17 98th St.	Ozone Park
286	66-44 Myrtle Ave.	Glendale
287	86-53 Grand Ave.	Elmhurst
288	56-29 68th St.	Maspeth
289	97-28 43rd Ave.	Corona
291	57-07 Metropolitan Ave.	Ridgewood
292	64-18 Queens Blvd.	Woodside
294	101-02 Jamaica Ave.	Richmond Hill
295	12-49 149th St.	Whitestone
297	119-11 14th Rd.	College Point
299	61-20 Utopia Pkwy	Fresh Meadows
301	91-02 197th St.	Hollis
304	218-44 97th Ave.	Queens Village
305	111-02 Queens Blvd.	Forest Hills
307	81-17 Northern Blvd.	Jackson Heights
308	107-12 Lefferts Blvd.	South Ozone Park
311	145-50 Springfield Blvd.	Springfield Gardens
313	44-01 244th St.	Douglaston
315	159-06 Union Tpke.	South Flushing
319	78-11 67th Road	Middle Village
320	36-18 Francis Lewis Blvd.	Bayside

325	41-24 51st St.	Woodside
328	16-15 Central Ave.	Far Rockaway
331	158-57 Cross Bay Blvd.	Howard Beach

26. Since May 1, 1979, the City has denied repeated requests by members of the class to increase the manning level in the remaining 71 Engine Companies to five (5) firefighters per tour and an officer.

27. Within the last year city officials, including the Mayor and the City Comptroller, have announced to the public a budgetary surplus in excess of $150,000,000 revealing that the initial purportedly adequate legal reason and justification for undermanning in the remaining 71 Engine Companies no longer exists.

28. Notwithstanding the aforementioned budgetary surplus, the City has continued to deny the requests of members of the class to bring the undermanned 71 Engine Companies up to the minimum manning level of five (5) firefighters per tour and an officer.

29. Of the aforementioned 71 Engine Companies, the following eight (8) are quartered without a Ladder Company, thus, further reducing the fire protection afforded to the Fire Districts where such single undermanned Engine Companies are assigned:

Engine Co.	**Address**	**Locale**
10	124 Liberty St. Manhattan	World Trade Center
323	6405 Avenue N Brooklyn	Mill Basin
270	91-45 121st St. Queens	Richmond Hill

274	41-20 Murray St. Queens	Flushing
288	56-29 68th St. Queens	Elmhurst
292	64-18 Queens Blvd. Queens	Woodside
308	107-12 Lefferts Blvd. Queens	South Ozone Park
319	78-11 67th Road Queens	Middle Village

30. Although specific requests to the City have been framed by members of the class seeking the minimal adequate manning of the aforementioned eight (8) single Engine Companies of at least five firefighters per tour and an officer in view of the utterly inadequate fire protection afforded the Fire Districts to which such single Engine Companies are assigned, the defendants have failed to comply with such requests.

31. Upon information and belief, there has been a dramatic increase in the number of responses to alarms, which include actual fires, false alarms and emergency calls, that the vast majority of Engine Companies located throughout the City have been required to make in the period 1968 to 1980.

32. As shown by the statistics set forth below, the 71 undermanned Engine Companies have experienced a similar dramatic increase in responses during the period 1968 to 1980:

Borough of Manhattan

Engine Co.	Address	Locale	1968 Responses	1980 Responses
1	142 W 31st St.	Herald Sq. Area	1546	2223
3	146 W 19th St.	Chelsea Area	1764	2561

7	100 Duane St.	City Hall Area	632	2299
8	165 E 51st St.	Midtown (East)	1372	2305
10	124 Liberty St.	World Trade Cent.	459	1883
16	234 E 29th St.	Murray Hill-Kips Bay	1225	1999
24	227 Sixth Ave.	Greenwich Vill.	1088	1866
33	42 Great Jones St.	East Village	2319	2843
34	440 W 38th St.	Hell's Kitchen-Clinton	1290	1820
40	131 Amsterdam Ave.	Lincoln Center Area	1811	2220
54	782 Eighth Ave.	Midtown (West)	1511	2767

Borough of Bronx

66	21 Asch. Loop W	Co-Op City	(Not Organized)	2235
89	2924 Bruckner Blvd.	Throgs Neck	1996	2615

Borough of Staten Island

151	7219 Amboy Rd.	Tottenville	390	1114
153	74 Broad St.	Stapelton	790	2258
155	14 Brighton Ave.	New Brighton	972	1655
157	1573 Castleton Ave.	Port Richmond	1059	2085
161	278 McClean Ave.	South Beach	801	1495
162	256 Nelson Ave.	Great Kills	999	2204
163	875 Jewett Ave.	Westerleigh	918	2061
164	1560 Drumgoole Rd.	West Hughenot	686	1930
165	3076 Richmond Rd.	New Dorp.	1266	2238
166	1400 Richmond Ave.	Granitville	686	2162

Borough of Brooklyn

202	31 Richards St.	Red Hook	1519	2407
205	74 Middagh St.	Bklyn Heights	860	1318
241	6630 Third Ave.	Bay Ridge	1623	2554
243	8653-18th Ave.	Bensonhurst	1491	2527
245	2929 W Eighth St.	Coney Island	2810	4101
246	2732 E 11th St.	Sheepshead Bay	1368	2756
254	901 Avenue U	Gravesend	2208	3015
276	1635 E 14th St.	Midwood	1431	2277
279	252 Lorraine St.	Red Hook	2220	3156
282	4210-12th Ave.	Borough Park	1645	2536
284	1157-79th St.	Dyker Heights	1361	2488
309	1851 E 48th St.	Marine Park	1633	2393
318	2510 Neptune Ave.	Coney Island	2089	2988
323	6405 Avenue N	Mill Basin	1480	1833

Borough of Queens

258	10-40 47th Ave.	Long Island City	1089	1174
259	33-51 Greenpoint Ave.	Long Island City	952	1418
261	37-20 29th St.	Long Island City	1370	2134
263	42-06 Astoria Blvd.	Astoria	1481	2369
264	16-15 Central Ave.	Far Rockaway	1145	2425
265	58-03 Rockaway Beach Blvd.	Arverne-Rockaway	2013	2037
268	257 Beach 116th St.	Rockaway Park	481	920
270	91-45 121st St.	Richmond Hill	1271	2132
273	40-18 Union St.	Flushing	1351	2133
274	41-20 Murray St.	Flushing	1236	2365
285	103-17 98th St.	Ozone Park	1392	3178
286	66-44 Myrtle Ave.	Glendale	776	1911
287	86-53 Grand Ave.	Elmhurst	1746	2329

288	56-29 68th St.	Maspeth	737	1673
289	97-28 43rd Ave.	Corona	2135	3376
291	57-07 Metropolitan Ave.	Ridgewood	1045	2180
292	64-18 Queens Blvd.	Woodside	1414	2169
294	101-02 Jamaica Ave.	Richmond Hill	968	Not in Service
295	12-49 149th St.	Whitestone	660	1110
297	119-11 14th Rd.	College Point	449	785
299	61-20 Utopia Pkwy	Fresh Meadows	1083	1418
301	91-02 197th St.	Hollis	1911	2876
304	218-44 97th Ave.	Queens Village	1676	2306
305	111-02 Queens Blvd.	Forest Hills	1426	1993
307	81-17 Northern Blvd.	Jackson Heights		2464
308	107-12 Lefferts Blvd.	South Ozone Park	2043	2638
311	145-50 Springfield Blvd.	Springfield Gardens	1868	2010
313	44-01 244th St.	Douglaston	585	1116
315	159-06 Union Tpke.	South Flushing	1590	2031
319	78-11 67th Road	Middle Village	828	1465
320	36-18 Francis Lewis Blvd.	Bayside	979	1637
325	41-24 51st St.	Woodside	1402	2290
328	16-15 Central Ave.	Far Rockaway	1090	1813
331	158-57 Cross Bay Blvd.	Howard Beach	1025	1898

33. Although increased responses have been experienced on a City-wide basis, this increased workload has impacted in a disproportionate fashion upon the firefighters assigned to the 71 undermanned Engine Companies.

34. This disproportionate workload impact has resulted in a decrease in the firefighting efficiency of the undermanned Engine

Companies through fatigue and fatigue-related line of duty injuries.

35. Further, by their assignment to undermanned Engine Companies, the individual firefighters are exposed to a risk of harm and physical injury significantly greater than the risk of harm to which individual firefighters assigned to five-firefighter per tour Engine Companies are exposed.

36. Apart from the basic inadequacy of the undermanned Engine Companies to satisfy the fire protection needs of the Fire Districts to which they are assigned, analysis and comparison of the fire protection needs of the Fire Districts assigned undermanned Engine Companies as opposed to Fire Districts assigned five (5) firefighters per tour Engine Companies reveals that there is no rational basis for the disparate provision of fire protection services.

37. Engine Companies 8 and 39 are both quartered on the East Side of Manhattan in adjacent Fire Districts. The Fire Districts served by each of these Engine Companies are essentially identical in those characteristics, including population density, traffic congestion and type of structures, which determine the fire protection needs of a district. Engine Company 8, however, is an undermanned Engine Company and Engine Company 39 is a five-firefighter per tour Company.

38. Engine Company 10, which is housed at 124 Liberty Street on the lower West side of Manhattan, covers a Fire District which includes the World Trade Center and the entire Wall Street area and further, must respond to alarms throughout a Fire District formerly protected by four (4) Engine Companies. Nonetheless, Engine Company 10 is undermanned and it is quartered without a Ladder Company.

39. In the Boroughs of Queens and Staten Island where 44 of the 71 undermanned Engine Companies are located, the response times far exceed the average response time for all other Engine Companies in the City because of the greater geographical placement of the operational firehouses, thus, resulting in further diminished fire protection for the undermanned Fire Districts in those Boroughs.

40. Ten (10) of the 11 undermanned Engine Companies in the Borough of Manhattan are located south of 59th Street where response times far exceed the average response time City-wide due to traffic conditions prevalent during the high activity period of the day and the closing since 1947 of 14 Engine Companies in this area.

41. Further, in the area south of 59th Street in the Borough of Manhattan, the number of greater alarm fires requiring the response of ten or more Companies has increased from 36 in 1980 to 66 in 1981. Fires of this magnitude, almost without exception, result in serious injury to firefighters, civilians and extensive property damage.

42. The Fire Department, upon information and belief, pursuant to the direction of the Commissioner, conducted tests and studies in or about August, 1981 in order to assess the comparative efficiency of four-firefighter Engine Companies as opposed to five-firefighter Engine Companies in fighting fires.

43. The aforementioned tests and studies, which were conducted under actual fire conditions in a multi-leveled structure on Randalls Island, revealed upon information and belief, an approximate 40 per cent greater efficiency of a five-firefighter Engine Company over a four-firefighter Engine Company.

44. Requests by members of the class for copies of the written reports, analyses, correspondence and summaries related to the aforementioned tests and studies have been denied by the City and the Fire Department.

45. Upon information and belief, based upon the aforementioned tests and studies and the conclusions drawn therefrom, the Commissioner recommended to the Mayor and the City that it was imperative that the manning level be increased in some or all of the 71 undermanned Engine Companies to five (5) firefighters per tour and an officer in order to provide a minimum level of adequate fire protection in the Fire Districts served by these undermanned Companies.

FIRST CLAIM FOR RELIEF

46. Plaintiffs repeat and reallege paragraphs "1" through "45" with the same force and effect as if such were set forth hereat in full.

47. The plaintiffs herein, under the laws of the State of New York and the Charter of the City, are entitled to the provision of adequate fire protection.

48. The policies, regulations and practices of the defendants described herein which have resulted in the provision of inadequate fire protection to the 71 undermanned Fire Districts are knowing and intentional.

49. The actions of the defendants in knowingly, intentionally and without just cause or rational basis failing and refusing to provide and maintain an adequate level of fire protection in the 71 undermanned Fire Districts necessary and essential to the protection of the lives, persons, property, homes and institutions

of the plaintiffs and the classes and subclasses they represent constitutes a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

50. The aforementioned policies, regulations and practices of the defendants do now, and unless declared unconstitutional and enjoined by this Court will continue to, endanger substantially the lives, health and property of the plaintiffs herein.

51. The defendants have repeatedly denied the requests of the plaintiffs to elevate the manning levels in the 71 undermanned Fire Districts so as to provide adequate fire protection to such districts and no other means of redress other than this action is available to the plaintiffs.

52. No remedy at law is adequate to redress the violation alleged herein of the plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

53. The facts set forth herein allege an actual case and controversy.

54. No other request has been made to any Court for the declaratory and injunctive relief sought herein.

SECOND CLAIM FOR RELIEF

55. Plaintiffs repeat and reallege paragraphs "1" through "54" with the same force and effect as if such were set forth hereat in full.

56. The policies, regulations and practices of the defendants described herein which have resulted in the provision of fire

protection to the plaintiffs not commensurate with the fire protection afforded all other residents and employees of the City are knowing and intentional.

57. The actions of the defendants in knowingly, intentionally and without just cause or rational basis failing and refusing to provide and maintain an adequate level of fire protection in the 71 undermanned Fire Districts commensurate with the fire protection provided all other residents and employees of the City constitutes a denial to the plaintiffs and the classes and subclasses they represent of equal protection of law in violation of the Fourteenth Amendment to the Constitution of the United States.

58. The aforementioned policies, regulations and practices of the defendants do now, and unless declared unconstitutional and enjoined by this Court will continue to, endanger substantially the lives, health and property of the plaintiffs herein.

59. The defendants have repeatedly refused the requests of the plaintiffs to elevate the fire protection afforded the 71 undermanned Fire Districts to a level commensurate to the fire protection afforded all other residents and employees in the City and no other means of redress other than this action is available to the plaintiffs.

60. No remedy at law is adequate to redress the violation alleged herein of the plaintiffs' rights under the Equal Protection Clause of the Constitution of the United States.

61. The facts set forth herein allege an actual case and controversy.

62. No other request has been made to any Court for the declaratory and injunctive relief sought herein.

Summons and Complaint

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray for relief as follows:

ON THE FIRST CLAIM FOR RELIEF

A. That this Court make and enter a judgment pursuant to 28 U.S.C. Section 2201 and Fed. R. Civ. P. 57 declaring that the failure of the defendants to provide plaintiffs adequate fire protection within the 71 Fire Districts assigned undermanned Engine Companies constitutes a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States;

B. That this Court make and enter a permanent injunction requiring the defendants to increase and maintain the manning level of the 71 undermanned Engine Companies to five (5) firefighters per tour and an officer;

C. That this Court retain jurisdiction in this action until such time as defendants have complied with the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the terms and conditions of any order or judgment to be entered herein; and

D. That this Court order whatever other relief that is equitable and just including awarding plaintiffs the costs, disbursements and reasonable attorneys' fees incurred in the prosecution of this action.

ON THE SECOND CLAIM FOR RELIEF

A. That this Court make and enter a judgment pursuant to 28 U.S.C. Section 2201 and Fed. R. Civ. P. 57 declaring that

the failure of the defendants to provide plaintiffs fire protection commensurate with the fire protection afforded all other residents and employees of the City constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States;

B. That this Court make and enter a permanent injunction requiring the defendants to increase and maintain the manning level of the 71 undermanned Engine Companies to five (5) firefighters per tour and an officer;

C. That this Court retain jurisdiction in this action until such time as defendants have complied with the requirements of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the terms and conditions of any order or judgment to be entered herein; and

D. That this Court order whatever other relief that is equitable and just including awarding plaintiffs the costs, disbursements and reasonable attorneys' fees incurred in the prosecution of this action.

Dated: March 22, 1982
Garden City, New York

COLLERAN, O'HARA,
KENNEDY & MILLS, P.C.

By JOHN F. MILLS
A Member of the Firm

Attorneys for the Class
Action Plaintiffs
1044 Franklin Avenue
Garden City, New York 11530
(516) 248-5757

REQUEST FOR DOCUMENTS UNDER RULE 34 (Dated April 16, 1982)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 1777

NICHOLAS MANCUSO, DOROTHY A. KENNEDY, MAY SMITH, SHELLY GOLDFEDER, DOROTHY S. KENNEDY, BRUCE T. GIAMMATTEI, VIRGINIA HAYES, RICHARD L. IADAROLA, IGNACIA F. MANIERI, NICK DeGAETA, JOHN J. McCLUSKEY, LOUIS C. CALL and KENNETH ELLIS, individually and on behalf of the class and subclasses of similarly situated persons,

Plaintiffs,

-against-

THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as President of the City Council, NEW YORK CITY FIRE DEPARTMENT, CHARLES J. HYNES, individually and as Fire Commissioner of the City of New York,

Defendants.

S I R S :

PLEASE TAKE NOTICE that plaintiffs hereby request each of the defendants to respond within thirty (30) days to the following requests, made pursuant to Rule 34 of the F.R.C.P., to produce and permit plaintiffs to copy and inspect any and all of the following which may be in their possession or in the

possession of any of their officers, agents, servants, employees or any other persons or entities under their control.

1. The words "number", "decision" or "action" shall include all documents, including writings, drawings, graphs, charts, photographs, phono-records, computer printouts and any other data compilations from which information can be obtained electronically, mechanically or otherwise, which concern, reflect, relate or refer to the following:

(A) The total number of first due responses and of that number, the number of false alarms or runs, actual fires or workers and emergency calls for each of the following engine companies in each calendar year from 1971 to and including the year end of 1981:

Borough of Manhattan
Engine Companies: 1, 3, 7, 8, 10, 16, 24, 33, 34, 40 and 54

Borough of Bronx
Engine Companies: 66 and 89

Borough of Staten Island
Engine Companies: 151, 153, 155, 157, 161, 162, 163, 164, 165 and 166

Borough of Brooklyn
Engine Companies: 202, 205, 241, 243, 245, 246, 254, 276, 279, 282, 284, 309, 318 and 323

Request for Documents Under Rule 34

Borough of Queens
Engine Companies: 258, 259, 261, 263, 264, 264, 268, 270, 273, 274, 285, 286, 287, 288, 289, 291, 292, 294, 295, 297, 299, 301, 304, 305, 307, 308, 311, 313, 315, 319, 320, 325, 328 and 331

(B) The total number of responses, other than first due response, and of that number, the number of false alarms or runs, actual fires or workers and emergency call for each of the following engine companies in each calendar year from 1971 to and including the year end of 1981:

Borough of Manhattan
Engine Companies: 1, 3, 7, 8, 10, 16, 24, 33, 34, 40 and 54

Borough of Bronx
Engine Companies: 66 and 89

Borough of Staten Island
Engine Companies: 151, 153, 155, 157, 161, 162, 163, 164, 165 and 166

Borough of Brooklyn
Engine Companies: 202, 205, 241, 243, 245, 246, 254, 276, 279, 282, 284, 309, 318 and 323

Borough of Queens
Engine Companies: 258, 259, 261, 263, 264, 264, 268, 270, 273, 274, 285, 286, 287, 288, 289, 291, 292, 294, 295, 297, 299, 301, 304, 305, 307, 308, 311, 313, 315, 319, 320, 325, 328 and 331

Request for Documents Under Rule 34

(C) The total number of first due responses and of that number, the number of false alarms or runs, actual first or workers and emergency call for all other engine companies, other than those listed in (A) and (B) above, in each calendar year from 1971 to and including the year end of 1981.

(D) The total number of responses, other than first due responses, and of that number, the number of false alarms or runs, actual fires or workers and emergency calls for all other engine companies, other than those listed in (A) and (B) above, in each calendar year from 1971 to and including the year end of 1981.

(E) The decision or action taken in or about the year 1971 to man every engine company throughout the City of New York with at least five (5) firefighters per tour and a fire officer.

(F) The decision or action taken in or about July, 1975 to reduce the manning in the following engine companies from five (5) firefighters and a fire officer per tour to four (4) firefighters and a fire officer per tour:

Borough of Manhattan
Engine Companies: 1, 3, 5, 6, 7, 8, 9, 10, 14, 15, 16, 18, 21, 22, 23, 24, 26, 27, 33, 34, 39, 40, 44, 47, 54, 55, 65, 67, 74, 76, 80, 84, 93 and 95

Borough of Brooklyn
Engine Companies: 201, 202, 204, 205, 206, 207, 209, 210, 211, 212, 214, 217, 219, 220, 221, 224,

225, 226, 228, 229, 230, 233, 235, 237, 238, 239, 240, 241, 242, 243, 245, 246, 247, 248, 249, 250, 252, 253, 254, 255, 257, 271, 276, 277, 278, 280, 281, 282, 284, 309, 310, 318, 321, 323 and 330

Borough of Bronx
Engine Companies: 38, 52, 61, 62, 63, 64, 66, 72, 79, 81, 89, 90 and 97

Borough of Queens
Engine Companies: 251, 258, 259, 260, 261, 262, 263, 264, 265, 266, 268, 270, 272, 273, 274, 275, 285, 286, 287, 288, 289, 291, 293, 294, 295, 297, 298, 299, 301, 302, 303, 304, 305, 306, 307, 308, 312, 313, 314, 315, 316, 317, 319, 320, 324, 325, 228, 229 and 331

Borough of Staten Island
Engine Companies: 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166 and 167

(G) The decision or action taken in or about the month of July, 1977 to elevate the manning in the following engine companies from four (4) firefighters and a fire officer per tour to five (5) firefighters and a fire officer per tour:

Borough of Manhattan
Engine Companies: 5, 67, 76, 80, 84, 93 and 95

Borough of Bronx
Engine Companies: 38, 62, 64, 79, 81 and 90

Request for Documents Under Rule 34

Borough of Brooklyn
Engine Companies: 214, 217, 218, 230, 235, 237 and 277

(H) The decision or action taken in an about the month of February, 1979 to elevate the manning in the following engine companies from four (4) firefighters and a fire officer per tour to five (5) firefighters and a fire officer per tour:

Borough of Manhattan
Engine Companies: 9, 15, 18, 22, 39, 44, 55, 65 and 74

Borough of Bronx
Engine Companies: 61, 63, 72 and 97

Borough of Staten Island
Engine Companies: 152, 156, 158, 159, 160 and 167

Borough of Brooklyn
Engine Companies: 201, 209, 210, 211, 212, 219, 220, 221, 225, 228, 229, 233, 248, 249, 250, 252, 255, 278, 280 and 281

Borough of Queens
Engine Companies: 251, 275, 293, 303, 314 and 324

(I) The decision or action taken in or about the month of May, 1979 to elevate the manning in the following engine companies from four (4) firefighters and a fire officer per tour to five (5) firefighters and a fire officer per tour:

Request for Documents Under Rule 34

Borough of Manhattan
Engine Companies: 6, 14, 21, 23 and 26

Borough of Bronx
Engine Companies: 52

Borough of Brooklyn
Engine Companies: 204, 206, 224, 226, 238, 239, 240, 242, 247, 253, 257, 271, 310, 321 and 330

Borough of Queens
Engine Companies: 260, 262, 266, 298, 302, 306, 312, 316 and 317

(J) The firefighting effectiveness and efficiency of an engine company manned with four (4) firefighters and a fire officer per tour and an engine company manned with five (5) firefighters and a fire officer per tour, including, but not limited to, all such documents which concern, reflect, relate or refer to the tests conducted on Randalls Island in or about August, 1981 and any recommendations, conclusions, analysis or summaries resulting from such tests.

(K) The incidence of fire related injuries and deaths to civilians, firefighters and fire officers separately stated for each and every engine company throughout the CITY OF NEW YORK for each calendar year from 1971 to and including the year end of 1981.

PLEASE TAKE NOTICE that the above described inspection and copying shall take place at the office of the FIRE

Request for Documents Under Rule 34

DEPARTMENT OF THE CITY OF NEW YORK located at 110 Church Street, New York, New York on the 17th day of May, 1982 at 9:30 a.m.

Dated: April 16, 1982
Garden City, New York

Yours, etc.,

COLLERAN, O'HARA,
KENNEDY & MILLS, P.C.
Attorneys for Plaintiffs

By Robert A. Kennedy
A Member of the Firm
1044 Franklin Avenue
Garden City, New York
11530-2960
(516) 248-5757

TO:

F.A.O. SCHWARZ
Corporation Counsel
City of New York
Attorney for Defendants
100 Church Street
New York, New York 10007

AFFIDAVIT OF MARILYN RICHTER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 1777
(TPG)

NICHOLAS MANCUSO, DOROTHY A. KENNEDY, MAY SMITH, SHELLY GOLDFEDER, DOROTHY S. KENNEDY, BRUCE T. GIAMMATTEI, VIRGINIA HAYES, RICHARD L. IADAROLA, IGNACIO F. MANIERI, NICK DeGAETA, JOHN J. McCLUSKEY, LOUIS C. CALL and KENNETH ELLIS, individually and on behalf of the class and subclasses of similarly situated persons,

Plaintiffs,

v.

THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as President of the City Council, NEW YORK CITY FIRE DEPARTMENT, CHARLES J. HYNES, individually and as Fire Commissioner of the City of New York,

Defendants.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARILYN RICHTER, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the Office of FREDERICK A.O. SCHWARZ, JR., Corporation Counsel of

the City of New York, attorney for defendants, and as such I am familiar with the facts and circumstances of this case.

2. Defendants now move for an order dismissing the complaint for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

3. The complaint alleges that defendants have somehow violated the rights of plaintiffs under the due process and equal protection clauses of the fourteenth amendment to the constitution by assigning 4 rather than 5 firefighters to 71 of the 210 engine companies in the New York City Fire Department.

4. Plaintiffs claim that a staffing level of 4 firefighters per engine company does not provide adequate fire protection and thereby violates their constitutional rights.

5. However, it is well settled that there is no constitutional right to adequate public services such as fire protection.

6. Plaintiffs further claim that the assignment of 4 rather than 5 firefighters to some engine companies violates the equal protection clause of the fourteenth amendment.

7. The complaint is devoid of any allegation that a recognized fundamental right is implicated or that a suspect class is being discriminated against by the assignment of 4 rather than 5 firefighters to some engine companies. Accordingly, plaintiffs' equal protection claim cannot succeed unless there is no possible rational basis for these staffing assignments.

8. Plaintiffs assert that the lower staffing levels were the result of the fiscal difficulties experienced by New York City in the

mid-1970's and that it is unconstitutional not to staff all engine companies with 5 firefighters now that the fiscal situation has improved and additional resources are allegedly available.

9. There are many possible rational bases for a decision not to allocate additional resources to fire protection at this time. Among them are decisions to allocate scarce resources to improve other important municipal services, to supplement reduced federal expenditures or to reduce municipal taxes or municipal debt. The constitution does not mandate that local officials select additional fire protection instead of these other options.

10. Additionally, plaintiffs allege that some of the decisions concerning which engine companies would be staffed by 4 rather than 5 firefighters were irrational.

11. The complaint contains no claim for relief based directly upon this allegation because the complaint does not seek reassignment of existing staff but instead seeks a mandated increase of staff so that every engine company is assigned 5 firefighters.

12. Furthermore, many possible rational bases for particular staffing assignments can be conceived of. One obvious rational basis is that, in general, engine companies with 5 firefighters serve areas with more fires and more fire alarms than engine companies with 4 firefighters. Plaintiffs do not allege otherwise.

13. In summary, the constitution does not empower a federal court, in the absence of a fundamental right or a suspect class, to examine the operations of each engine company within the Fire Department of the City of New York to determine what is an appropriate staffing level for each engine company.

WHEREFORE, deponent respectfully requests that the complaint be dismissed, with costs.

s/ Marilyn Richter
MARILYN RICHTER

Sworn to before me this
11th day of May, 1982.

s/ Leslie C. Kamelhar
Notary Public State of New York
Commission Expires March 30, 1983

STATEMENT OF MAYOR KOCH DATED APRIL 20, 1983

THE CITY OF NEW YORK OFFICE OF THE MAYOR
EDWARD I. KOCH

Tel: 566-5090 93-83

For Release:
Wednesday, April 20, 1983

STATEMENT BY MAYOR EDWARD I. KOCH

I have decided that my executive budget, to be released next week, will not propose any reductions in Fire Department manning, and will not include the eliminations of three battalions and one division contemplated in our January financial plan.

I have made this decision for a number of reasons:

First, as a question of managerial prerogative, it appears that the general reduction in our work force that would be necessary, under existing agreements, to trigger our right to reduce manning unilaterally will not be taking place, and so the basic legal assumption upon which we included four-man manning in the budget has been eliminated.

Second, the Fire Department, under Commissioner Joseph E. Spinnato, has taken significant strides to reduce its expenditures for overtime — it was the overtime expenditure necessitated by five-man manning that was a principal reason for my original proposal to reduce manning. During fiscal year 1983, the Department has reduced its overtime expenditures by $5 million, or 16 percent, over the same period last year.

Third, a number of elected officials, particularly City Council Vice Chairman and Majority Leader Thomas J. Cuite, Finance

Statement of Mayor Koch

Committee Chairman Edward L. Sadowsky and Public Safety Committee Chairman Frederick E. Samuel, have expressed concern that the city has not yet met its burden of proof that a reduction in manning would not create any safety issues. While I believe that it would not create any danger, I respect the judgment of these officials and wish to respond to their concerns.

Fourth, Nicholas Mancuso, President of the Uniformed Firefighters Association, has raised similar objections to the proposal and I respect his judgment as well.

Finally, although I continue to believe that a reduction in manning would be a step toward greater efficiency, I never thought or suggested that the presence of the fifth man was an extravagance, and so I am not offended that five-man manning will continue in these companies until and unless we can satisfy the concerns that have been raised.

I am very proud of what the New York City Fire Department — management and labor — has accomplished recently. I am confident that record of achievement will continue in the future.

Office Supreme Court, U.S.
FILED
NOV 17 1983
ALEXANDER L. STEVAS,

No. 83-425

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

NICHOLAS MANCUSO, DOROTHY A. KENNEDY, MAY SMITH, SHELLY GOLDFEDER, DOROTHY S. KENNEDY, BRUCE I. GIAMMETTEI, VIRGINIA HAYES, RICHARD L. IADAROLA, IGNACIA F. MANIERI, NICK DeGAETA, JOHN J. McCLUSKEY, LOUIS C. CALL and KENNETH ELLIS, individually and on behalf of the class and subclasses of similarly situated persons,

Petitioners,

-against-

THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as President of City Council, NEW YORK CITY FIRE DEPARTMENT, CHARLES J. HYNES, individually and as Fire Commissioner of the City of New York,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 566-6037 or 4338

LEONARD KOERNER,
JUNE A. WITTERSCHEIN,
of Counsel.

QUESTION PRESENTED

Whether the District Court properly dismissed, and the Court of Appeals properly affirmed the dismissal of the complaint for failure to state a claim upon which relief can be granted where the complaint challenges the administrative determination concerning the number of firefighters assigned to some New York City firetrucks as violative of the Equal Protection and Due Process Clauses of the United States Constitution.

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No. 83-425

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

NICHOLAS MANCUSO, DOROTHY A. KENNEDY, MAY SMITH, SHELLY GOLDFEDER, DOROTHY S. KENNEDY, BRUCE I. GIAMMETTEI, VIRGINIA HAYES, RICHARD L. IADAROLA, IGNACIA F. MANIERI, NICK DeGAETA, JOHN J. McCLUSKEY, LOUIS C. CALL and KENNETH ELLIS, individually and on behalf of the class and subclasses of similarly situated persons,

Petitioners,

-against-

THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as President of City Council, NEW YORK CITY FIRE DEPARTMENT, CHARLES J. HYNES, individually and as Fire Commissioner of the City of New York,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

The respondent New York City Fire Department (Fire Department), pursuant to McKinney's New York General City Law §20(12) and

New York City Charter §487, provides firefighting and fire prevention services throughout New York City. The basic unit within the Fire Department providing these services is a fire company. Fire companies are comprised of either an engine company, which carries hoses and pumping equipment, or of a ladder company, which carries hooks and ladders. There are two hundred ten engine companies in the New York City Fire Department (20a).*

Prior to 1971, a large number of engine companies were staffed by four firefighters (21a). In 1971, staffing was increased and each engine company was assigned five or more firefighters per tour of duty (21a).

In 1975, however, due to budgetary deficits experienced as a result of the fiscal crisis, the number of firefighters per tour was reduced to four

*Unless otherwise indicated, numbers in parentheses followed by the letter "a" are references to pages in the Appendix to the Petition.

in all but forty-two engine companies (21a). In addition, fifty-one firefighting units were closed.

Between July, 1977 and May, 1979, the fiscal situation improved. Accordingly, staffing was increased to present levels - the levels which are being challenged in this lawsuit. The relevant allocation of Fire Department personnel is as follows: 139 engine companies are staffed with five firefighters per tour of duty while seventy-one engine companies have four firefighters assigned to each tour of duty (22a).

In March, 1982, petitioners commenced this civil rights action, seeking declaratory and injunctive relief. Petitioners allege that the above-stated levels of staffing are inadequate and thus they are deprived of sufficient fire protection (10a-36a). Petitioners further allege that this deprivation constitutes a violation of the Equal Protection Clause and the Due Process Clause of the United States Constitution. Furthermore, petitioners allege that they are entitled to an order directing respondents to increase the number of firefighters

from four to five, in those seventy-one engine companies which are allegedly "undermanned".

In May, 1982, respondents moved pursuant to the Federal Rules of Civil Procedure (FRCP) Rule 12(b)(6), to dismiss the complaint. Respondents sought dismissal on the ground that the issue of staffing levels of New York City firetrucks is one within the judgment of the municipality to determine how best to allocate limited resources. Respondents argued that under no set of facts could the question of staffing rise to the level of a constitutional deprivation (45a-48a).

The United States District Court for the Southern District of New York (GRIESA, J.) granted the respondents' motion to dismiss (7a). The court held that petitioners' complaint "borders on the frivolous" (6a). Further, the District Court held:

> The question of the level of fire protection in New York City is a matter to be decided by the City government and ultimately by the political process. The complaint itself alleges that, over the years, staffing has varied from time to time, and from company to

company. There is no allegation of anything which could make the matter of a staffing level of 4 firemen amount to a federal constitutional question on any theory (6a).

The Second Circuit Court of Appeals affirmed the judgment dismissing the complaint (1a-4a). With respect to petitioner's claim that the manning of engine companies in their fire districts with four and not five firefighters denied them equal protection of the laws, the Court of Appeals held that there is a "rational basis for the City's decision," (3a) which petitioners themselves "acknowledge in their pleadings" (2a). Thus, the Second Circuit found petitioner's equal protection argument to be without merit.

The Court of Appeals found petitioner's "due process claims are no more credible" (3a). The court stated petitioners' contention that New York City's laws create an entitlement to fire protection "is to mistake a power for a duty. To contend that this fancied general duty, even if it existed, creates the specific constitutional requirement of an additional

firefighter in four-person companies is to mistake the Constitution for a wish list" (3a). Moreover, the Court found specific authority for New York City to decrease the size of its firefighting forces in the New York City Administrative Code §1173-4.3(b) which "empowers the City 'to relieve its employees from duty because of lack of work or for other legitimate reasons....' " (3a). Accordingly, the Second Circuit Court of Appeals affirmed the judgment dismissing the complaint.

REASONS FOR DENYING THE WRIT

PETITIONERS HAVE FAILED TO SET FORTH SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI IN THIS MATTER.

Petitioners do not seek review by this Court to resolve a conflict between the decisions of the District Court and Court of Appeals herein, and those of other state or federal courts. Rather, their sole basis for seeking review is an "alleged departure from the usual course of judicial proceedings" when the District Court dismissed and

the Court of Appeals affirmed dismissal of their complaint. It is respectfully submitted that the courts below did not depart from the usual course of judicial proceedings in dismissing the complaint since petitioners can prove no set of facts in support of their claim which would entitle them to relief; moreover, even if the dismissal was procedurally improper, it is not a matter which warrants review by this Court.

A. PETITIONERS' COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

1. There is a rational basis for the determination concerning how many firefighters man a firetruck.

While conceding that neither a suspect classification nor a fundamental right is involved in this matter, petitioners argue, nonetheless, that they have been denied equal protection of the laws. To so argue, they must be able to prove that there is no possible rational basis for the New York City determination to staff some firetrucks with four firefighters while others are staffed with five

firefighters. Kelley v. Johnson, 425 US 238, 247 (1975); Lindsley v. National Carbonic Gas Co., 220 US 61, 78 (1911). However, on the face of their own complaint petitioners have stated that the reductions in staffing from five to four firefighters in 1975 was due "solely to the budgetary deficits experienced by the City...." (21a). Thus, petitioners' equal protection claim is without basis.

However, petitioners now argue for the first time that while the fiscal situation may have been the original rational basis for the decision to cutdown on staffing, it no longer qualifies as a rational basis for the continued "undermanning". The Mayoral statement upon which petitioners rely for that argument belies such an assertion.*

*Respondents did not and do not rely upon the Mayoral Statement to support their argument that the complaint should be dismissed pursuant to FRCP 12(b)(6). However, since petitioners ask this Court to take judicial notice of the Statement, we simply wish to point out that it supports our legal argument that there is a rational basis for the determination in question.

As the Mayor's April, 1983 statement makes clear, further reductions in Fire Department manning were no longer necessary as a result of an improved fiscal situation. Nowhere in the Mayor's statement is there any indication that there was sufficient funds to increase the number of firefighters on all City firetrucks to five. Indeed, quite the contrary seems apparent from the Mayor's statement that one of the reasons why further reductions were unnecesary is that "the Fire Department ... has taken significant strides to reduce its expenditures for overtime - it was the overtime expenditure necessitated by five-man manning that was a principal reason for my original proposal." (49a). Thus, it is quite clear that the determination of how many firefighters will man City firetrucks is financial in nature, and constitutes a decision as to how scarce resources should be allocated.

Petitioners' complaint amounts to no more than a claim that the classifications made by respondents resulting in their fire districts being

protected by four-man firetrucks, are classifications which are not made with "mathematical nicety [and] in practice ... result in some inequality." Dandridge v. Williams, 397 US 471, 485 (1970), quoting, Lindsley v. Natural Carbonic Gas Co., 220 US 61, 78 (1911). The courts have repeatedly held that with respect to claims of inadequate municipal services, or services which are not distributed in an equal manner, that the "Constitution does not require that laws treat every individual alike [in order] to withstand constitutional attack ... and a government body may draw lines or make decisions which treat individuals or entities differently. [Indeed], [t]he Constitution does not explicitly provide a right to municipal services." Mlikotin v. City of Los Angeles, 643 F 2d 652, 653 (9th Cir., 1981) (citations omitted). See also Dandridge v. Williams, 397 US 471, 485 (1970) ("The problems of government are practical ones and may justify, if they do not require, rough accommodatoins - illogical, it may be, and unscientific").

Thus, in reviewing determinations such as the one in issue here, where administrative or legislative officers are forced to draw lines on how far municipal services will extend and how many tax dollars will be allocated for those services, the courts are reluctant to interfere in those decisions. In San Antonio School District v. Rodriguez, 411 US 1, 40-41 (1973), this Court noted its reluctance.

> "This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause:
> 'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized .... [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies .... It has ... been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive

> discrimination against particular persons and classes ....' Madden v. Kentucky, 309 U.S. 83 87-88 (1940)."

Accordingly, in San Antonio, this Court held that the Texas system of financing public school education did not discriminate against its students on the basis of wealth, nor did it deny them a fundamental constitutional right to education.

Courts are even more reluctant to interfere with decisions concerning staffing of fire services (since it does not rise to as high a level of constitutional significance as education) and indeed, some courts have specifically found that inadequate fire and police services do not violate the Equal Protection Clause. Shortino v. Wheeler, 531 F 2d 938, 939 (8th Cir., 1976); Reiff v. City of Philadelphia 471 F Supp 1262 (E.D. Pa., 1979); see also Jackson v. City of Joliet, 715 F 2d 1200 (7th Cir., 1983); Local 736 v. City of Williamsport, 470 F Supp 344 (M.D. Pa.), aff'd, 601 F 2d 575 (3rd Cir.), cert. den. 444 US 932 (1979) and Reedy v. Mullins, 456 F Supp 955 (W.D. Pa., 1978) (where courts

rejected the claim that plaintiffs were deprived of adequate fire protection in violation of Due Process Clause of the Fourteenth Amendment). Similarly, courts have rejected challenges to municipal services in general, as well as challenges to municipal services in hospitals and in parks. Mlikotin v. City of Los Angeles, 643 F 2d 652 (9th Cir., 1981); Jackson v. New York City Health and Hospitals Corporation, 419 F Supp 809 (S.D. N.Y., 1979); Beal v. Lindsay, 468 F 2d 287 (2d Cir., 1972). Quite simply, since respondents' decision to staff certain engine companies with four firefighters is not based upon suspect classifications and is grounded in, inter alia, fiscal concerns, petitioners have not and cannot state a claim of denial of Equal Protection under the Fourteenth Amendment.

2. Petitioners have not been denied procedural or substantive due process by the reductions in Fire Department staffing.

In order to establish a property interest in adequate fire protection which would be shielded by the Due Process Clause of the Fourteenth

Amendment, petitioners must be able to demonstrate "more than an abstract need or desire for it. [They] must have more than a unilateral expectation of it. [They] must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 US 564, 577 (1972). Furthermore, petitioners must be able to prove that their legitimate claim of entitlement (1) is "grounded in and defined by some independent source of authority" [Wooters v. Jornlin, 477 F Supp 1140, 1144 (D. Del.), aff'd, 622 F 2d 580 (3d Cir., 1979), cert. den., 449 US 992 (1980)]; (2) is not "terminable 'at will' by governmental authorities" [Local 736 v. City of Williamsport, 470 F Supp 344, supra at 347]; and (3) is based upon a duty of the municipal officers to provide adequate fire services, and that that duty is owed to them as individuals "rather than to the public at large" [Wooters v. Jornlin, 477 F Supp 1140, supra at 1144.

To support their claim that they have a constitutionally protected property interest in having firetrucks staffed with five firefighters,

petitioners make the following arguments. They argue that their claim of entitlement is grounded in the following state laws: (1) McKinney's New York General City Law §20 (12) -which gives cities the power "to prevent and extinguish fires and to protect the inhabitants of the city and property within the city from loss or damage by fire or other casualty"; and (2) New York City Charter §487 which gives the defendant Fire Department the "sole and exclusive power and authority to extinguish fires at any place within the jurisdiction of the city...." Petitioners then argue that since the language of the General City Law §20 provides cities with the power to protect their inhabitants from fires, adequate fire protection is a duty which is owed to them as individuals and not to the public at large. Petitioners are clearly mistaken in their belief that fire protection is owed to them as individuals and not to the public at large.

It cannot be gainsaid that in determining whether a property interest under the Due Process Clause exists, the federal courts should look to state

decisional law to measure the scope of the interest in question. New York State decisions are clear that the municipal duty to provide services such as fire protection does not inure to the benefit of individual members of the public. For example, the New York State Court of Appeals recently held that New York City could not be found liable for its building inspector's failure to discover a leak in a gas system which ultimately caused an explosion. In holding that the cited provisions of the building code did not create a municipal duty to exercise care for the benefit of a particular class of individuals, as opposed to the public at large, the State Court of Appeals relied upon a long history of precedent which had never gone so far "as to hold that a general liability exists to the public for civil damage in event of failure to supply adequate police or fire protection." O'Connor v. City of New York, 58 NY 2d 184, 190 (1983), citing, Motyka v. City of Amsterdam, 15 NY 2d 134 (1965); see also Weiner v. Metropolitan Transportation Authority, 55 NY 2d 175 (1982) (the Transit Authority's allocation of

police resources is a legislative-executive decision for which there is no liability); Sanchez v. Village of Liberty, 42 NY 2d 876 (1977) (no liability may be imposed on a municipality for failure to enforce fire safety regulations). Thus, petitioners' reliance upon the term "inhabitants" in the General City Law as giving them an individual claim of entitlement is clearly misplaced. New York State and City laws simply do not create an individual claim of entitlement to adequate fire protection.

Furthermore, the law in New York State allows the level of staffing of municipal services to be changed at the will of the governmental authorities responsible for those services. Repeated challenges to the level of staffing in all phases of governmental service have been rejected by the New York courts,* since it is "undoubtedly within

*See, for example: Vizzini v. Beame, NYLJ, 12/16/74, p. 2, col. 2. (Sup. Ct., N.Y. Co., Baer, J.), aff'd, 47 AD 2d 602 (1st Dept., 1975) (closing of firehouses was upheld since "it is not the function

(footnote cont'd on next page)

the proper province of the municipality to determine how limited resources are best utilized. In meeting their responsibilities to the City's inhabitants municipal executives may allocate manpower and resources in such fashion as their best judgment indicates." Towns v. Beame, 386 F Supp 470, 474 (S.D.N.Y., 1974). Thus, in refusing to enjoin several New York City officials from closing eight fire companies in New York City, Judge Cannella in Towns v. Beame held that it was not the proper function of the Court to "secondguess or evaluate the wisdom of such determinations by the City." Id.

New York City Administrative Code §1173-4.3 also provides that employees can be removed from

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* (footnote cont'd from previous page)

of the courts to assume supervision over the operations [of] municipal government."); Steele v. Board of Education, 40 NY 2d 456 (1976) (abolition of guidance counselor positions, necessitated by the fiscal crisis, was upheld); Blyn v. Bartlett, 39 NY 2d 349 (1976) (abolition of, inter alia, law secretary positions, due to fiscal crisis, was upheld).

service for economic reasons. See DeLury v. City of New York, 51 AD 2d 288 (1st Dept., 1976) (where City layoff of sanitation workers during fiscal crisis was upheld despite contract which extended beyond layoff date). Thus, contrary to petitioners' argument, inhabitants of New York do not have a constitutionally protected property interest in having their engine companies manned with five firefighters. The Fourteenth Amendment does not require that petitioners be afforded an opportunity for a hearing prior to effecting a reduction in the staffing of New York City firetrucks.

Nor does a reduction in staffing constitute an infringement on a "fundmanetal constitutional right." Jackson v. City of Joliet, 715 F 2d 1200, 1204 (7th Cir., 1983) ("[T]he concept of liberty in the Fourteenth Amendment does not include a right to basic services, whether competently provided or otherwise"). The types of intrusion on personal security the Fourteenth Amendment is molded to protect are substantive aspects of life, liberty, and property. "Here, however, there is no claim that the

interest entitled to protection as a matter of substantive due process was anything resembling 'the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life'." Harrah Independent School District v. Martin, 440 US 194, 198 (1979), quoting, Kelley v. Johnson, 425 US 238, 244 (1976); see also Roe v. Wade, 410 US 113 (1973). Nor does petitioners' claim amount to conduct which "shocks the conscience" in violation of the Due Process Clause. Rochin v. California, 342 US 165, 172 (1952); see also White v. Rochford, 592 F 2d 381, 385 (7th Cir., 1979). Very simply, petitioners' claim is no more than a disagreement with the discretionary action taken by governmental authorities in allocating scarce resources.

In Kelley v. Johnson, 425 US 238 (1976), the plaintiff officers objected to the Suffolk County Police Department regulations limiting the length of its policemen's hair. In analyzing whether plaintiffs had a "liberty interest" within the Fourteenth Amendment in the freedom of choice with respect

to matters of personal appearance, this Court stated (425 US at 247-248):

> The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments employ a uniformed police force to aid in the accomplishment of that purpose. Choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952); Prince v. Massachusetts, 321 U.S. 158, 168-170 (1944); Olsen v. Nebraska, 313 U.S. 236, 246-247 (1941). Having recognized in other contexts the wide latitude accorded the government in the "dispatch of its own internal affairs," Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1961), we think Suffolk County's police regulations involved here are entitled to similar weight. Thus the question is not, as the Court of Appeals conceived it to be, whether the State can "establish" a "genuine public need" for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation, based as it

> is on the county's method of organizing its police force, and the promotion of safety of persons and property. United Public Workers v. Mitchell, 330 U.S. 75, 100-101 (1947); Jacobson v. Massachusetts, 197 U.S. 11, 30-31, 35-37 (1905).
>
> We think the answer here is so clear that the District Court was quite right in the first instance to have dismissed respondent's complaint. Neither this Court, the Court of Appeals, nor the District Court is in a position to weigh the policy arguments in favor of and against a rule regulating hairstyles as a part of regulations governing a uniformed civilian service. The constitutional issue to be decided by these courts is whether petitioner's determination that such regulations should be enacted is so irrational that it may be branded "arbitrary," and therefore a deprivation of respondent's "liberty" interest in freedom to choose his own hairstyle. Williamson v. Lee Optical Co., 348 U.S. 483, 487-488 (1955) (Emphasis supplied).

Since this Court found that the regulation was not arbitrary, it held that no right guaranteed by the Fourteenth Amendment had been violated, and upheld dismissal of the complaint.

The analysis applied in Kelley should be applied here. The issue of how many firefighters

should man an engine company is unquestionably "within the cognizance of the [City's] police power" and should be accorded a "presumption of ... validity." Id. at 247. Since the determination in question involves allocation of "available public funds in such a way as fully to meet the needs of the largest possible number of [inhabitants]" Dandridge v. Williams, 397 US 471, 485 (1970), it cannot be considered arbitrary. Thus, petitioners have not and cannot set forth any rights guaranteed by the Fourteenth Amendment which are being violated by the present staffing levels on City firetrucks. Dismissal of their complaint by the District Court was proper.

B. THE MOTION TO DISMISS WAS NOT CONVERTED TO A MOTION FOR SUMMARY JUDGMENT.

Petitioners argue at length that by granting the motion to dismiss the complaint, the District Court departed from the usual course of judicial proceedings on the ground that the dismissal motion was converted into a summary judgment motion. The premise of petitioners' argument is that in

granting respondents' application, the District Court relied upon respondents' counsel's affidavit filed in support of the motion. Petitioners' premise is incorrect.

Although the District Court did not affirmatively reject respondents' counsel's affidavit, there is absolutely nothing to indicate in either opinion below that, in fact, the affidavit was relied upon (1a-6a); thus, "it can be presumed that the district court did not use the affidavit in arriving at its decision to dismiss. The district court must have impliedly excluded the affidavit since it characterized its decision as a motion to dismiss for failure to state a claim rather than as a motion for summary judgment." AMFAC Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F 2d 426, 430 fn. 3 (9th Cir., 1978).

Even if the District Court read the affidavit in support of the motion, "the affidavit contains little of substance, and nothing which was needed by this court or impliedly by the district court to arrive at a decision." Id. It is submitted that the dismissal can

be sustained without regard to matters contained in the affidavit. See Gordon v. National Youth Work Alliance, 675 F 2d 356, 361 (D.C. Cir., 1982). The affidavit did not make any extraneous factual statements relied upon by the District Court in dismissing the complaint, and, at most, it posited conceivable rational bases, including fiscal considerations, upon which the staffing determination might have rested. (45a-48a). Since the court need go no further than the face of petitioners' complaint to find the same rational basis for the determination in question, it is clear that dismissal of the complaint, prior to discovery, was in all respects proper. See Scheuer v. Rhodes, 416 US 232, 235 fn. 3 (1974) (where, in setting forth the standard to be applied on a motion to dismiss, this Court noted that affidavits which made "no substantial contribution" to the questions in issue were disregarded). There is simply no basis for concluding that this matter was treated as a summary judgment application.

Finally, it is submitted that this Court's statement in Kelley v. Johnson, 425 U 238, 248 (1976), that dismissal of the complaint by the District Court in that action was proper, is instructive that claims involving purely discretionary issues within the State's police power are appropriate ones to be dismissed at the pleading stage. Moreover, even if dismisal in this instance were improper, the simple procedural issue petitioners raise does not merit review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

November 2, 1983

Respectfully submitted,

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